

No. 10990

W. 2486

United States
Circuit Court of Appeals

For the Ninth Circuit.

NATHAN NEWMAN, W. O. FILES, R. H.
SHAFFER, and BURT CAIN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

OCT 17 1945

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court for the Northern District of
California

No. 29086-R

18 U.S.C.A. Section 88: (Conspiracy to violate
Title 50 U. S. Code, Appendix, Sections 904a-
925);

In the November 1944 term of said Division of
said District Court, the Grand Jurors thereof on
their oaths present:

That Charles Malaby, Nathan Newman, W. O.
Files, R. H. Shaffer, Oscar R. Lowenthal, Primo
Rocco, Burt Cain (hereinafter called said defend-
ants), at a time and place to said Grand Jurors un-
known, did unlawfully, wilfully, knowingly and
feloniously conspire and agree together and with
divers other persons to said Grand Jurors un-
known, to commit offenses against the laws of the
United States, to-wit, offenses in violation of Title
50 United States Code, Appendix, Sections 904a-
925, by wilfully selling and delivering and by wil-
fully offering to sell and deliver, a certain com-
modity, to-wit, distilled spirits (whiskey), at prices
over and in excess of the maximum prices duly
established by the Price Administrator [1*] by
regulations and orders duly made and promulgated
under the provisions of 50 United States Code, Ap-
pendix, Section 902(a), and that thereafter and
during the existence of said conspiracy and to effect
the object thereof, one or more of said defendants

*Page numbering appearing at foot of page of original certified
Transcript of Record.

as hereinafter mentioned by name, did at the times and places hereinafter set out, and within the jurisdiction of this Court, commit the following acts in furtherance of said conspiracy:

1. On or about March 10, 1944, the defendants Nathan Newman, Charles Malaby, R. H. Shaffer and Walter O. Files met together at 309 Kearney Street, San Francisco, California;

2. On or about March 11, 1944, the defendants Charles Malaby, Nathan Newman and Oscar Lowenthal met together in the City of San Francisco;

3. On or about April 7, 1944, the defendant Oscar R. Lowenthal had a conversation with James Gibson and Elliott R. Smith at 1782 Seventh Street, Oakland, California.

4. On or about April 8, 1944 at 1782 Seventh Street, Oakland, James Gibson and Elliott R. Smith paid the defendants Charles Malaby and Nathan Newman the sum of \$1480.50;

5. On or about May 24, 1944 at Oakland, California, the defendants Charles Malaby and Nathan Newman received a check from James Gibson and Elliott R. Smith in the amount of \$1809.50;

6. On or about May 5, 1944, the defendant Charles Malaby, accompanied Martin Fuchlin to the premises known as 309 Kearney Street, and Martin Fuchlin there deposited \$1265.00 with the defendant W. O. Files;

7. On or about April 1, 1944, the defendant Oscar R. Lowenthal took the order of one Robert C. Thomason at 309 San Pablo Avenue, El Cerrito, California, for 100 cases of whiskey; [2]

8. On or about April 8, 1944, Robert C. Thomason paid the sum of \$2671.00 to Charles Malaby at 309 Kearney Street, San Francisco, in the presence of the defendants W. O. Files and Oscar R. Lowenthal;

9. On or about April 24, 1944 the defendant Charles Malaby called at the premises known as Spengers at 1919 4th Street, Berkeley, and later the defendant Charles Malaby accompanied Frank Spenger to the office of the defendant W. O. Files, at 309 Kearney Street, San Francisco, where Frank Spenger deposited \$13,736 and received a receipt therefor from the defendant W. O. Files.

FRANK J. HENNESSY,
United States Attorney

A true bill,

D. BOSSCHART,
Foreman.

Presented in Open Court and Ordered. Filed Dec. 20, 1944. C. W. Calbreath, Clerk. By J. P. Welsh, Deputy Clerk.

Approved as to Form:

..... [3]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 29086-R

UNITED STATES OF AMERICA,
Plaintiff and Appellee

vs.

CHARLES MALABY, NATHAN NEWMAN,
W. O. FILES, R. H. SHAFFER, OSCAR R.
LOWENTHAL, PRIMO ROCCO and BURT
CAIN,

Defendants and Appellants.

DEMURRER

Comes now Nathan Newman, defendant, herein,
and demurs to the indictment upon the following
grounds:

I.

That said indictment does not state a public offense against him.

II.

That said indictment is so indefinite, uncertain and ambiguous that this defendant is not advised of the charges which he is called upon to meet under said indictment.

Wherefore, the defendant, Nathan Newman, prays that the indictment herein may be quashed

and that he be discharged and allowed to go hence without day.

CANNON & CALLISTER,
Attorneys for Defendant,
Nathan Newman [4]

CERTIFICATE

I, David H. Cannon, one of the attorneys for the above named defendant, hereby certify that the above and foregoing Demurrer is filed in good faith and not for the purpose of delay and in my opinion is well taken in law.

Dated January 2, 1945.

DAVID H. CANNON

POINTS AND AUTHORITIES IN SUPPORT OF THE FOREGOING DEMURRER

I.

The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intents; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.

U. S. vs. Cruikshank, 92 U.S. 542, 558.

U. S. v Bopp, et al., 230 Fed. 723.

Fuller vs. U. S., 114 Fed. (2d) 698.

II.

Reference in the indictment to the particular statute under which the indictment is drawn neither adds to, nor detracts from the sufficiency of the charge as contained in the indictment.

Biskind v. U. S., 281 Fed. 47 (CCA).

Johnson v. Biddle, 12 Fed. (2d) 366, 369.

III.

There is no sufficient charge in this indictment of an intention on the part of the alleged conspirators to violate a law of the United States. Such allegations in clear terms must be made or it is fatal to the indictment.

U. S. v. Morse, 287 Fed. 906.

Stokes v. U. S., 157 U. S. 187, 39 L. Ed. 667, 668.

[Endorsed]: Filed Jan. 3, 1945. [6]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 3rd day of January, in the year

of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

DEMURRER ON BEHALF OF NEWMAN
OVERRULED—PLEAS OF NOT GUILTY

This case came on regularly this day for arraignment. The defendant Charles Malaby was present with his attorney, Leslie Gillen, Esq. The defendants Nathan Newman and W. O. Files were present with their attorney, Fred. McDonald, Esq. The defendant R. H. Shaffer was present with his attorney, Leslie Gillen, Esq. The defendant Oscar R. Lowenthal was present with his attorney, A. J. McGuire, Esq. The defendant Burt Cain was present with his attorney, Charles Dreyfus, Esq. William E. Licking, Esq., Assistant United States Attorney, was present on behalf of the United States.

On motion of Mr. Licking, the defendants were called for arraignment. The defendants were informed of the return [7] of the Indictment by the United States Grand Jury, and asked if they were the persons named therein, and upon their answer that they were, and that their true names were as charged, said defendants were informed of the charges against them and stated that they understood the same. Counsel for defendants waived the reading of the Indictment.

Mr. McDonald filed a demurrer on behalf of the defendant Newman, which said demurrer was or-

dered overruled and to which ruling of the Court an exception was noted.

The defendants were called to plead. The following defendants each entered a plea of "Not Guilty": Charles Malaby, Nathan Newman, W. O. Files, R. H. Shaffer, Oscar R. Lowenthal and Burt Cain.

After hearing the attorneys, it is ordered that this case be set for trial on January 23, 1945. (Jury).

The defendant Primo Rocco was not present. On motion of Mr. Licking, it is ordered that this case be continued to January 10, 1945, for arraignment of said defendant.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 23rd day of January, in the year of our Lord on thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

DEFENDANTS WAIVED TRIAL BY JURY

This case came on regularly this day for trial. William E. Licking, Esq., Assistant United States

Attorney, was present on behalf of the United States. The defendants were present with their respective attorneys: Charles Malaby with J. W. Ehrlich, Esq.; Nathan Newman with David Cannon, Esq.; W. O. Files and Fred. McDonald, Esq.; R. H. Shaffer with Leslie Gillen, Esq.; Oscar R. Lowenthal with Albert McGuire, Esq.; Primo Rocco with Miss Agnes O'Brien; and Burt Cain with Alden Ames, Esq., Burke Mathew, Esq., and S. E. Sheffey, Esq.

On motion of Mr. Ehrlich, it is ordered that the defendant Charles Malaby be allowed to withdraw his former plea of Not Guilty. Thereupon the defendant Charles Malaby withdrew his former plea of "Not Guilty" and entered a plea [9] of "Guilty", which said plea was ordered entered. On motion of Mr. Ehrlich and with the consent of Mr. Licking, it is ordered that the defendant Charles Malaby may be released on the bond heretofore filed, and that this case be continued to January 24, 1945, for pronouncing of judgment as to defendant Charles Malaby.

Miss O'Brien, on behalf of the defendant Primo Rocco, made a motion for severance, which said motion was ordered granted and that this case be continued to January 24, 1945, for trial as to defendant Primo Rocco.

Thereupon each of the defendants Nathan Newman, W. O. Files, R. H. Shaffer, Oscar R. Lowenthal and Burt Cain and the attorneys herein waived a trial by jury. On motion of Mr. McDonald, it is ordered that all witnesses be excluded from the

Court Room, with the exception of the witness testifying and Clyde Bird, the agent in charge of this case. Joseph Nathanson, Clyde Bird, Steve Vincentini, Vincenzo Gabrielli, Wm. S. Johnson, Rudolph Lichtenberg, Chas. Ferretti and Enrico Barroti were each sworn and testified on behalf of the United States. Mr. Cannon introduced in evidence and filed Defendants' Exhibit A. Mr. Licking offered certain exhibits which were numbered 1, 2, 3, 3-A, 3-B, 3-C, 4, 4-A, 5, 6, 6-A, 7, 7-A, 8, 9, 11, 12, 12-A, 13, 14, 15, 16, 16-A, 17, 18, 19, 19-A, 20, 20-A, 20-B, 21, 22, 22-A, 23 and 24 for identification. After hearing the attorneys, it is ordered that the further trial of this case be continued to January 24, 1945. [10]

[Title of District Court and Cause.]

MOTION FOR ARREST OF JUDGMENT

Comes now the defendant Nathan Newman and moves the court to refrain from entering a judgment against him based upon the court's finding of guilt in this case upon the following grounds:

1. That the said indictment does not state facts sufficient to constitute a punishable offense or any offense or crime against the laws or any law or against the Constitution of the United States, and particularly, said indictment does not state facts sufficient to constitute a violation of Title 18, United States Code, Section 88, a conspiracy to

violate title 50 to the United States Code, Appendix Section 904a-925.

Dated: February 2nd, 1945.

DAVID H. CANON

Attorney for Defendant

NATHAN NEWMAN [11]

I, David H. Cannon, do hereby certify that the above and foregoing motion is made in good faith and not for the purpose of delay, and in my opinion is well taken in law.

.....
DAVID H. CANNON

Attorney for Defendant

NATHAN NEWMAN

POINTS AND AUTHORITIES IN SUPPORT OF THE FOREGOING MOTION

Reference is respectfully made to written Memorandum on Behalf of Nathan Newman, Defendant, heretofore and on January 23, 1945, served and filed with the above entitled court and particularly upon the following authorities therein cited:

United States v. Eisenminger, 17 Fed. (2d) 816, 817.

United States v. Kissel, et al, CCA, N.Y. 173 Fed. 823.

United States v. Cruikshank, 292 U.S. 542, 558, 23 L.Ed. 588.

Pettibone v. United States, 148 U. S. 197, 37 L.Ed. 419, 422.

United States v. Carll, 101 U.S. 661; 26 L.Ed. 1135.

[Endorsed]: Filed Feb. 2, 1945. [12]

District Court of the United States Northern District of California Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 2nd day of February, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

DEFENDANTS ADJUDGED GUILTY — MOTIONS IN ARREST OF JUDGMENTS DENIED—SENTENCES AND JUDGMENTS

The defendants and the attorneys being present as heretofore, the further trial of this case was this day resumed. After hearing the arguments of Mr. McGuire, Mr. McDonald, Mr. Ames, Mr. Gillen for the defendants, and William E. Licking, Esq., Assistant United States Attorney, for the United States, and the case being submitted and fully considered, It Is Ordered that each of the defendants Nathan Newman, W. O. Files, R. H. Shaffer, Oscar R. Lowenthal and Burt Cain be and he is here-

by Adjudged Guilty as charged in the Indictment. Attorneys Cannon, McDonald, Sheffy, Gillen and McGuire each made a motion in arrest of judgment on behalf of each defendant, which said motions were ordered denied and to which ruling of the Court an exception was noted. Mr. McDonald on behalf of defendant W. O. Files, Mr. Ames on behalf of defendant Burt Cain, [13] and Mr. McGuire on behalf of defendant Oscar R. Lowenthal each made a motion to refer the case to the Probation Officer, which said motions were ordered denied.

The defendants were called for judgment. After hearing the defendants and the attorneys, and said defendants having been now asked whether they have anything to say why judgment should not be pronounced against them, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant Nathan Newman, having been adjudged guilty by the Court of the offense charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) Year and One (1) Day and pay a fine to the United States in the sum of Ten Thousand (\$10,000.00) Dollars, and in default of payment of fine that said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a U. S. Penitentiary.

Ordered and Adjudged that the defendant W. O. Files, having been adjudged Guilty by the Court of the offense charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Nine (9) Months and pay a fine to the United States of America in the sum of Five Thousand (\$5,000.00) Dollars, and that in [14] default of payment of fine said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a Jail Type Institution.

Ordered and Adjudged that the defendant Oscar R. Lowenthal, having been adjudged Guilty by the Court of the offense charged in the Indictment, be and he is hereby committed to the custody of the

Attorney General or his authorized representative for imprisonment for the period of Nine (9) Months and pay a fine to the United States of America in the sum of Five Thousand (\$5,000.00) Dollars, and that in default of payment of fine said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a Jail Type Institution.

Ordered and Adjudged that the defendant R. H. Shaffer, having been adjudged Guilty by the Court of the offense charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized [15] representative for imprisonment for the period of Nine (9) Months and pay a fine to the United States of America in the sum of Five Thousand (\$5,000.00) Dollars, and that in default of payment of fine said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a Jail Type Institution.

Ordered and Adjudged that the defendant Burt Cain, having been adjudged Guilty by the Court of the offense charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) Year and One (1) Day and pay a fine to the United States of America in the sum of Ten Thousand (\$10,000.00) Dollars, and in default of payment of fine that said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a U. S. Penitentiary. [16]

District Court of the United States Northern
District of California, Southern Division

No. 29086-R

UNITED STATES

vs.

R. H. SHAFFER

Criminal Indictment in one count for violation of
Title 18 USCA Sec. 88; (Conspiracy to violate
Title 50 U.S. Code, Appendix, Section 904a-
925).

JUDGMENT AND COMMITMENT

On this 2nd day of February, 1945, came the
United States Attorney, and the defendant R. H.
Shaffer appearing in proper person, and by coun-
sel and,

The defendant having been adjudged guilty by
the Court of the offense charged in the Indictment
in the above-entitled cause, to wit: Violation of
Title 18 USCA Sec. 88. Defendant did, at a time
and place unknown, unlawfully conspire and agree
together and with divers other persons to sell and
deliver certain distilled whiskey, at prices over
and in excess of the maximum prices established
by law, and did certain overt acts to effect the ob-
ject of said conspiracy, and the defendant having
been now asked whether he has anything to say
why judgment should not be pronounced against
him, and no sufficient cause to the contrary being
shown or appearing to the Court, It Is by the Court.

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Nine (9) Months, and pay a fine to the United States of America in the sum of Five Thousand (\$5,000.00) Dollars; and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

W. E. LICKING

Assistant U. S. Attorney.

(Signed)

MICHAEL J. ROCHE

United States District Judge.

The Court recommends commitment to a Jail Type Institution.

Entered in Vol. 35 Judg. and Decrees at page 328.

[Endorsed]: Filed and entered this 2nd day of February, 1945. [17]

District Court of the United States Northern
District of California, Southern Division

No. 29086-R

UNITED STATES

vs.

W. O. FILES

Criminal Indictment in one count for violation of
Title 18 USCA Sec. 88; (Conspiracy to violate
Title 50 U.S. Code, Appendix, Sections 904a-
925).

JUDGMENT AND COMMITMENT

On this 2nd day of February, 1945, came the
United States Attorney, and the defendant W. O.
Files appearing in proper person, and by coun-
sel, and,

The defendant having been adjudged guilty by
the Court of the offense charged in the Indictment
in the above-entitled cause, to wit: Violation of
Title 18 USCA, Sec. 88. Defendant, did, at a time
and place unknown, unlawfully conspire and agree
together and with divers other persons to sell and
deliver certain distilled whiskey, at prices over
and in excess of the maximum prices established by
law, and did certain overt acts to effect the object
of said conspiracy, and the defendant having been
now asked whether he has anything to say why judg-
ment should not be pronounced against him, and
no sufficient cause to the contrary being shown or
appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Nine (9) Months and pay a fine to the United States of America in the sum of Five Thousand (5,000.00) Dollars; and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

W. E. LICKING

Assistant U. S. Attorney.

(Signed)

MICHAEL J. ROCHE

United States District Judge.

The Court recommends commitment to a Jail Type Institution.

Entered in Vol. 35, Judg. and Decrees at page 329.

[Endorsed]: Filed and entered 2nd day of February, 1945. [18]

District Court of the United States Northern
District of California, Southern Division

No. 29086-R

UNITED STATES

vs.

BURT CAIN

Criminal Indictment in one count for violation of
Title 18 USCA Sec. 88; (Conspiracy to violate
Title 50 U.S. Code, Appendix, Sections 904a-
925).

JUDGMENT AND COMMITMENT

On this 2nd day of February, 1945, came the
United States Attorney, and the defendant Burt
Cain appearing in proper person, and by coun-
sel, and,

The defendant having been adjudged guilty by
the Court of the offense charged in the Indictment
in the above-entitled cause, to wit: Violation of
Title 18 USCA, Sec. 88. Defendant did, at a time
and place unknown, unlawfully conspire and agree
together and with divers other persons to sell and
deliver certain distilled whiskey, at prices over and
in excess of the maximum prices established by law,
and did certain overt acts to effect the object of
said conspiracy, and the defendant having been
now asked whether he has anything to say why
judgment should not be pronounced against him,
and no sufficient cause to the contrary being shown
or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) Year and One (1) Day, and pay a fine to the United States in the sum of Ten Thousand (10,000.00) Dollars and that said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

W. E. LICKING

Assistant U. S. Attorney.

(Signed)

MICHAEL J. ROCHE

United States District Judge.

The Court recommends commitment to a U. S. Penitentiary.

Entered in Vol. 35 Judg. and Decrees at Page 330.

[Endorsed]: Filed and entered this 2nd day of February, 1945. [19]

District Court of the United States Northern
District of California, Southern Division

No. 29086-R

UNITED STATES

vs.

NATHAN NEWMAN

Criminal Indictment in one count for violation of
Title 18 USCA Sec. 88; (Conspiracy to violate
Title 50 U.S. Code, Appendix, Sections 904a-
925).

JUDGMENT AND COMMITMENT

On this 2nd day of February, 1945, came the
United States Attorney, and the defendant Nathan
Newman appearing in proper person, and by coun-
sel, and,

The defendant having been adjudged guilty by
the Court of the offense charged in the Indictment
in the above-entitled cause, to wit: Violation of
Title 18 USCA, Sec. 88. Defendant did, at a time
and place unknown, unlawfully conspire and agree
together and with divers other persons to sell and de-
liver certain distilled whiskey, at prices over and
in excess of the maximum prices established by law,
and did certain overt acts to effect the object of said
conspiracy, and the defendant having been now
asked whether he has anything to say why judg-
ment should not be pronounced against him, and
no sufficient cause to the contrary being shown or
appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) Year and One (1) Day, and Pay a fine to the United States in the sum of Ten Thousand (10,000.00) Dollars; and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

W. E. LICKING

Assistant U. S. Attorney.

(Signed)

MICHAEL J. ROCHE

United States District Judge.

The Court recommends commitment to a U. S. Penitentiary.

Entered in Vol. 35 Judg. and Decrees at Page 331.

[Endorsed]: Filed and entered this 2nd day of February, 1945. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—R. H. Shaffer, 309 Kearny Street, San Francisco, California.

Name and address of appellant's attorney—Leslie C. Gillen, 886 Mills Building, San Francisco 4, California.

Offense: Conspiracy (Section 88, Title 18 United States Code) to violate Title 50, United States Code Appendix, Sections 904a-925.

Date of judgment—February 2nd, 1945.

Brief description of judgment or sentence—Entered judgment of conviction and defendant sentenced to nine (9) months in the County Jail, and to pay a fine of Five Thousand (\$5,000.00) Dollars.

Name of prison where now confined, if not on bail—County Jail, City and County of San Francisco.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment above-mentioned on the grounds set forth below.

R. H. SHAFFER

Dated: February 3rd, 1945.

GROUND OF APPEAL

That the court erred in refusing to grant this appellant's motion to dismiss and refusing to acquit this appellant upon his motion made at the close of the prosecution's case and upon his motion

made at the close of all of the evidence in the case; that the court erred in refusing to grant appellant's motion for arrest of judgment; that the trial court committed errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding appellant guilty; that the indictment does not state a public offense.

[Endorsed]: Filed Feb. 3, 1945. [22]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—W. O. Files, 309 Kearny Street, San Francisco, California.

Name and address of appellant's attorney—Fred McDonald, Mills Building, San Francisco 4, California.

Offense: Conspiracy (Section 88, Title 18 United States Code) to violate Title 50, United States Code Appendix, Sections 904a-925.

Date of judgment—February 2nd, 1945.

Brief description of judgment or sentence—Entered judgment of conviction and defendant sentenced to nine (9) months in the County Jail, and to pay a fine of Five Thousand (\$5,000.00) Dollars.

Name of prison where now confined, if not on bail—County Jail, City and County of San Francisco.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

W. O. FILES

Dated: February 3rd, 1945.

GROUND'S OF APPEAL

That the court erred in refusing to grant this appellant's motion to dismiss and refusing to acquit this appellant upon his motion made at the close of the prosecution's case and upon his motion made at the close of all of the evidence in the case; that the court erred in refusing to grant appellant's motion for arrest of judgment; that the trial court committed [23] errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding appellant guilty; that the indictment does not state a public offense.

[Endorsed]: Filed Feb. 3, 1945. [24]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—Nathan Newman, 518 North Kilkea, Los Angeles, California.

Name and address of appellant's attorney—David H. Cannon, 650 South Spring Street, Los Angeles, California.

Offense: Conspiracy (Section 88, Title 18 United States Code) to violate Title 50, United States Code Appendix, Sections 904a-925.

Date of judgment—February 2nd, 1945.

Brief description of judgment or sentence—Entered judgment of conviction and defendant sentenced to one year and one day in the penitentiary and to pay a fine of Ten Thousand (\$10,000.00) Dollars.

Name of prison where now confined, if not on bail—County Jail, City and County of San Francisco.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

NATHAN NEWMAN

Dated: February 3rd, 1945.

GROUND OF APPEAL

That the court erred in refusing to grant this appellant's motion to dismiss and refusing to acquit this appellant upon his motion made at the close of the prosecution's case and upon his motion made at the close of all of the evidence in the case; that the court erred in refusing to grant appellant's motion for arrest of judgment; that the trial court committed [25] errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding ap-

pellant guilty; that the indictment does not state a public offense.

[Endorsed]: Filed Feb. 3, 1945. [26]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—Burt Cain, 458 South Spring Street, Los Angeles, California.

Name and address of appellant's attorney—David H. Cannon, 650 South Spring Street, Los Angeles, California.

Offense: Conspiracy (Section 88, Title 18 United States Code) to violate Title 50, United States Code Appendix, Sections 904a-925.

Date of judgment—February 2nd, 1945.

Brief description of judgment or sentence—Entered judgment of conviction and defendant sentenced to one year and one day in the penitentiary and to pay a fine of Ten Thousand (\$10,000.00) Dollars.

Name of prison where now confined, if not on bail—County Jail, City and County of San Francisco.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

BURT CAIN

Dated: February 3rd, 1945.

GROUNDS OF APPEAL

That the court erred in refusing to grant this appellant's motion to dismiss and refusing to acquit this appellant upon his motion made at the close of the prosecution's case and upon his motion made at the close of all of the evidence in the case; that the court erred in refusing to grant appellant's motion for arrest of judgment; that the trial court committed [27] errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding appellant guilty; that the indictment does not state a public offense.

[Endorsed]: Filed Feb. 3, 1945. [28]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of Said Court:

Sir:

Please issue a certified transcript of the following matters and documents, including endorsements in the above entitled cause:

1. Indictment.
2. Demurrers to the Indictment filed by the above named defendants.
3. Order overruling Demurrers.
4. Motions for Arrest of Judgments and Orders Denying the same.

5. Sentence and Judgment.
6. Notices of Appeal.
7. Assignment of Errors.
8. All Stipulations and Orders of Court in re. extension of time to prepare, serve or settle the Bill of Exceptions.
9. Bonds on Appeals and Cost Bonds.
10. Bill of Exceptions as approved and allowed by the Court.
11. Order Approving and Settling Bill of Exceptions.
12. Stipulation for copying original exhibits into printed Bill of Exceptions.
13. Stipulation for Certification to the Circuit Court of certain exhibits.
14. Stipulation re eliminating title of Court and Cause in printing in record and this Praecipe.

DAVID H. CANNON

Attorney for said Defendants
and Appellants. [29]

[Acknowledgment of receipt of copy]

[Endorsed]: Filed Mar. 2, 1945. [30]

[Title of District Court and Cause.]

STIPULATION RE. CERTIFICATION, ETC.,
OF EXHIBITS

It is hereby stipulated by and between counsel for appellants and counsel for respondent, that all exhibits in the above entitled action which have

not been copied in the Bill of Exceptions, shall, by the Clerk of the District Court be certified and forwarded to the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 2nd day of March, 1945.

DAVID H. CANNON

Attorney for said Defendants
and Appellants.

FRANK H. HENNESSY

United States Attorney.

By W. E. LICKING

Ass't United States Attorney.
Attorney for Plaintiff and
Respondent.

It is so ordered.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 3, 1945. [31]

[Title of District Court and Cause.]

STIPULATION RE. OMISSION OF TITLE OF
COURT AND CAUSE, ETC.

It is hereby stipulated by and between the parties hereto and their respective attorneys in the above entitled cause, that the Clerk of the Court may, in preparing the certified transcript of the record, omit from the caption of all documents, except the indictment, filed in said cause, the title of the court

and cause, and insert therein the words "Title of Court and Cause."

It is further stipulated that the Clerk of the Court may omit all words and figures upon the back of all documents in the record, except the filing mark thereof.

Dated this 2nd day of March, 1945.

DAVID H. CANNON

Attorney for said Defendants
and Appellants.

FRANK J. HENNESSY

United States Attorney.

By W. E. LICKING

Ass't United States Attorney
Attorney for Plaintiff and
Respondent.

It is so ordered.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 3, 1945. [32]

[Title of District Court and Cause.]

STIPULATION FOR COPYING ORIGINAL
EXHIBITS IN PRINTED BILL OF EX-
CEPTIONS

It is hereby stipulated by and between the parties hereto, through their respective attorneys, that all exhibits which are omitted and not copied in the proposed Bill of Exceptions, may be copied by the

printer from the original exhibits as filed in this case, at the respective places so specified for said exhibits in the Bill of Exceptions.

Dated: This 2nd day of March, 1945.

DAVID H. CANNON

Attorney for said Defendants
and Appellants.

FRANK J. HENNESSY

United States Attorney.

By W. E. LICKING

Ass't United States Attorney
Attorney for Plaintiff and
Respondent.

It is so ordered.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 3, 1945. [33]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

Bond #824-0018

Know All Men by These Presents:

That we, Burt Cain, of the County of Los Angeles, California, as Principal, and the Northwest Casualty Company, a Washington Corporation, as Surety, are jointly and severally held firmly bound unto the United States of America in the sum of Ten Thousand and No/100 Dollars (\$10,000.00), for the payment of which sum we and each of us

bind themselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 2nd day of February, 1945, at a term of the District Court of the United States in and for the Northern District of California, Southern Division, in an action pending in the said Court in which the United States of America is Plaintiff and Burt Cain was Defendant, a judgment and sentence was made, given rendered and entered against the said Burt Cain in the above entitled action, whereas he was convicted as charged in the Indictment.

Whereas, in said judgment and sentence so made, given, rendered and entered against said Burt Cain, he was by said judgment sentenced to imprisonment for one year and one day under said Indictment, and to be imprisoned in an institution of the penitentiary type for such term of one year and one day and to pay a fine of \$10,000; and

Whereas, the said Burt Cain has filed a notice of appeal from the said conviction and from the said judgment and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and [34]

Whereas, the said Burt Cain has been admitted to bail pending the decision upon said appeal in the sum of Ten Thousand and No/100 Dollars (\$10,000.00)

Now, Therefore, the conditions of this obligation are such that if said Burt Cain shall appear in per-

son, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his appeal; and if the said Burt Cain shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit, and if the said Burt Cain shall surrender himself in execution of said judgment and sentence, if the judgment and sentence be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit; and if the said Burt Cain will appear for trial in the District Court of the United States in and for the Northern District of California, Southern Division on such day or days as may be appointed for retrial by said District Court, if the judgment and sentence against him be reversed, then this obligation shall be null and void; otherwise to remain in full force and effect.

BURT CAIN

Principal

(Seal)

NORTHWEST CASUALTY

COMPANY, a Washington
Corporation

By A. W. APPEL

Attorney-in-Fact. [35]

This Is An Appearance Bond And Cannot Be
Construed As a Guarantee for Fines.

(Justification of Surety)

Approved as to form:

FRANK J. HENNESSY

United States Attorney.

By WILLIAM LICKING,

Assistant United States
Attorney.

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

DAVID H. CANNON

Attorney for Defendant and
Appellant.

The foregoing bond is approved this 12th day of March, 1945.

MICHAEL J. ROCHE

United States District Judge.

(Here Follows Certified Copy of Power of Attorney Issued to A. W. Appel)

[Endorsed]: Filed Mar. 12, 1945. [36]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

The premium charge on this bond is \$10.00 per annum.

That we, Burt Cain, of the County of Los Angeles, California, as Principal, and United States Fidelity and Guaranty Company, a Corporation Organ-

ized and Existing Under the Laws of the State of Maryland with Principal Office in the City of Baltimore, State of Maryland, and Authorized to Transact Business in the State of California, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of \$250.00, for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 2nd day of February, 1945, at a term of the District Court of the United States in and for the Northern District of California, Southern Division in an action pending in the said Court in which the United States of America is plaintiff and Burt Cain was defendant, a judgment and sentence was made, given, rendered and entered against the said Burt Cain in the above entitled action, whereas he was convicted as charged in the Indictment.

Whereas, in said judgment and sentence so made, given, rendered and entered against said Burt Cain, He was by said judgment sentenced to imprisonment for one year and one day under said Indictment, and to be imprisoned in an institution of the penitentiary type for such term of one year and one day and to pay a fine of \$10,000.00; and

Whereas, the said Burt Cain has filed a notice of appeal from the said conviction and from the said judgment and [37] sentence, appealing to the

United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, if the said Burt Cain, the principal here, shall prosecute his appeal with effect and answer all costs, if he fails to make his said plea good, then the said obligation shall be null and void, otherwise to remain in full force and virtue.

BURT CAIN

Principal.

(Seal)

UNITED STATES FIDELITY
AND GUARANTY
COMPANY

By ERNEST W. COPELAND,
Attorney in Fact.

(Justification of Surety)

Approved as to form:

FRANK J. HENNESSY

United States Attorney

By WILLIAM E. LICKING

Assistant United States
Attorney.

Attorney for Plaintiff.

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

DAVID H. CANNON

Attorney for Defendant and
Appellant. [38]

The foregoing bond is approved this 12th day of March, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 12, 1945. [39]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

The premium charge on this bond is \$200.00 per annum.

Know All Men by These Presents:

That we, Nathan Newman, of the County of Los Angeles, California, as Principal and United States Fidelity and Guaranty Company, a Corporation Organized and Existing Under the Laws of the State of Maryland with Principal Office in the City of Baltimore, State of Maryland, and Authorized to Transact Business in the State of California, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of \$10,000.00, for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 2nd day of February, 1945, at a term of the District Court of the United States in and for the Northern District of California, Southern Division in an action pending

in the said Court in which the United States of America is plaintiff and Nathan Newman was defendant, a judgment and sentence was made, given, rendered and entered against said Nathan Newman in the above entitled action, whereas he was convicted as charged in the Indictment.

Whereas, in said judgment and sentence so made, given, rendered and entered against said Nathan Newman, he was by said judgment sentenced to imprisonment for one year and one day under said Indictment, and to be imprisoned in an institution of the penitentiary type for such term of one year and one day and to pay a fine of \$10,000.00; and

Whereas, the said Nathan Newman has filed a notice of appeal from the said conviction and from the said judgment [40] and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said Nathan Newman has been admitted to bail pending the decision upon said appeal in the sum of \$10,000.00,

Now, Therefore, the conditions of this obligation are such that if said Nathan Newman shall appear in person, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day of days as may be appointed for the hearing of said cause in said court and prosecute his appeal; and if the said Nathan Newman shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit, and if the said Nathan Newman shall surrender himself in execution of said judgment and sentence, if the

judgment and sentence be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit; and if the said Nathan Newman will appear for trial in the District Court of the United States in and for the Northern District of California, Southern Division on such day or days as may be appointed for retrial by said District Court, if the judgment and sentence against him be reversed, then this obligation shall be null and void; otherwise to remain in full force and effect.

NATHAN NEWMAN

Principal.

(Seal)

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY

By ERNEST W. COPELAND,
Attorney in Fact.

(Justification of Surety) [41]

Approved as to form:

FRANK J. HENNESSY

United States Attorney

By WILLIAM E. LICKING

Assistant United States
Attorney.

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

DAVID H. CANNON

Attorney for Defendant and
Appellant.

The foregoing bond is approved this 12th day of March, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 12, 1945. [42]

[Title of District Court and Cause.]

COST BOND ON APPEAL

The premium charge on this bond is \$10.00 per annum.

Know All Men by These Presents:

That we, Nathan Newman, of the County of Los Angeles, California, as Principal, and United States Fidelity and Guaranty Company, a Corporation organized and Existing under the Laws of the State of Maryland with Principal Office in the City of Baltimore, State of Maryland, and Authorized to Transact Business in the State of California, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of \$250.00, for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 2nd day of February, 1945, at a term of the District Court of the United States in and for the Northern District of California, Southern Division in an action pending

in the said Court in which the United States of America is plaintiff and Nathan Newman was defendant, a judgment and sentence was made, given, rendered and entered against the said Nathan Newman in the above entitled action, whereas he was convicted as charged in the Indictment.

Whereas, in said judgment and sentence so made, given, rendered and entered against said Nathan Newman, he was by said judgment sentenced to imprisonment for one year and one day under said Indictment, and to be imprisoned in an institution of the penitentiary type for such term of one year and one day and to pay a fine of \$10,000.00; and

Whereas, the said Nathan Newman has filed a notice of [43] appeal from the said conviction and from the said judgment and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, if the said Nathan Newman, the principal here, shall prosecute his appeal with effect and answer all costs, if he fails to make his said appeal good, then the said obligation shall be null and void, otherwise to remain in full force and virtue.

NATHAN NEWMAN

Principal

(Seal)

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY

By ERNEST E. COPELAND,
Attorney in Fact.

(Justification of Surety)

Approved as to form:

FRANK J. HENNESSY

United States Attorney

By WILLIAM E. LICKING

Assistant United States
Attorney.

Attorney for Plaintiff.

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

DAVID H. CANNON

Attorney for Defendant and
Appellant.

The foregoing bond is approved this 12th day of March, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 12, 1945. [44]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

Bond #30531

Know All Men by These Presents:

That we, W. O. Files, of the City and County of San Francisco, State of California, as principal, and the National Automobile and Casualty Insurance Company, a California corporation, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of Five

Thousand (\$5,000.00) Dollars, for the payment of which sum we, and each of us, bind ourselves, our heirs, executors and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 2nd day of February, 1945, at a term of the United States District Court in and for the Northern District of California, Southern Division, in an action in said court numbered 29086-R, in which the United States of America is plaintiff and W. O. Files was defendant, judgment and sentence was made, given, rendered and entered against the said W. O. Files in the above entitled action, whereas he was convicted as charged in said action.

Whereas, in said judgment and sentence so made, given, rendered and entered against said W. O. Files in said action, he was sentenced by said judgment to imprisonment as follows: nine (9) months in the County Jail and to pay a fine of \$5,000.00.

Whereas, the said W. O. Files has filed a Notice of Appeal from said conviction and from said judgment and sentence appealing to the United States Circuit Court for the Ninth Circuit; and

Whereas, the said W. O. Files has been admitted to bail pending the decision upon said appeal in the sum of Five [45] Thousand (\$5,000.00) Dollars;

Now, Therefore the conditions of this obligation are such that if said W. O. Files shall appear in person, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such

day or days as may be appointed for the hearing of said cause in said Court and shall prosecute his appeal, and if said W. O. Files shall abide by and obey all orders made by said United States Circuit Court of Appeals for the Ninth Circuit, and if said W. O. Files shall surrender himself in execution of such judgment and sentence if the judgment and sentence be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, and if said W. O. Files will appear for trial in the District Court of the United States in and for the Northern District of California, Southern Division, on such day or days as may be appointed for the re-trial by said District Court if the said judgment and sentence against him be reversed, then this obligation shall be null and void; otherwise, to remain in full force and effect.

This recognizance shall be deemed and construed to contain the "express agreement," summary judgment and execution thereon mentioned in Rule 10 of the District Court.

W. O. FILES

Principal

(Seal)

NATIONAL AUTOMOBILE
AND CASUALTY INSUR-
ANCE CO., (a California Cor-
poration)

By A. C. GORMAN

Attorney-in-Fact. [46]

(Justification as to Surety. Justification as to Principal)

I hereby certify that I have examined the above bond and that, in my opinion, the form thereof is correct and the surety thereon is qualified.

FRED McDONALD

Attorney for Defendant and
Appellant

The foregoing bond is approved this 13th day of March, 1945.

FRANK J. HENNESSY

United States Attorney

By W. E. LICKING

Assistant United States
Attorney

The foregoing bond is approved this 13th day of March, 1945.

MICHAEL J. ROCHE

Judge of the United States
District Court

[Endorsed]: Filed Mar. 13, 1945. [47]

At a Stated Term, to wit: The October Term 1944, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the second day of April in the year of our Lord one thousand nine hundred and forty-five.

Present:

Honorable Francis A. Garrecht, Circuit Judge,
Presiding,

Honorable Clifton Mathews, Circuit Judge,

Honorable William Healy, Circuit Judge.

[Title of Cause.]

ORDER EXTENDING TIME TO SETTLE
AND FILE BILL OF EXCEPTIONS

Upon consideration of the application of Mr. David H. Cannon, counsel for appellants, and of his affidavit in support of such application, and stipulation of Mr. William E. Licking, Assistant United States Attorney, counsel for appellee, and by direction of the Court,

It Is Ordered that the appellants herein may have to and including April 15, 1945, within which to prepare, serve and lodge the proposed bill of exceptions herein, and to file their assignments of error; that the appellee have ten days thereafter within which to file its proposed amendments to the bill of exceptions, and that the time for settling and filing of the bill of exceptions be, and the same is hereby extended to May 1, 1945. [48]

I Hereby Certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at

the City of San Francisco, in the State of California, this 3rd day of April, 1945.

PAUL P. O'BRIEN

Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Apr. 3, 1945. [49]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS BY NATHAN
NEWMAN, W. O. FILES AND BURT CAIN

Come now the above named defendants and in connection with the Appeal herein say and each of them says:

That in the record and proceedings prior to and during the trial of the above entitled cause in said District Court, error has intervened to their and his prejudice and make the following Assignment of Errors which they aver occurred in the trial of said cause, to-wit:

I.

Said District Court erred in denying their Demurrers to the indictment herein upon each and all of the grounds set out in said Demurrers, and requiring them to plead to the said indictment.

II.

Said District Court erred in denying the motions made by them at the close of the plaintiff's case in chief to acquit them, the said Nathan Newman,

W. O. Files and Burt Cain, of the charges made in said indictment. The grounds of said motions [50] were, and the grounds of said errors in denying said motions were and are that the indictment does not state a cause of action or state offenses against said moving defendants, and that the proof before the court was, and is insufficient to hold them, the said Nathan Newman, W. O. Files and Burt Cain, to answer to the said indictment.

III.

Said District Court erred in denying their motions made by them at the close of all of the evidence in the case, to dismiss the said indictment, and to acquit them on each of the charges in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were, and are, that the evidence adduced was and is insufficient to hold them, the said Nathan Newman, W. O. Files and Burt Cain, and would not and does not tend to prove that the said Nathan Newman, W. O. Files and Burt Cain are guilty in any manner or form as charged in said indictment.

IV.

Said District Court erred in entering judgment against and in pronouncing sentence upon the said defendants, Nathan Newman, W. O. Files and Burt Cain, in that the matters and things alleged in said indictment do not constitute an offense against the laws of the United States.

V.

The District Court erred in denying the motions made by the said defendants after the Court had found the defendants guilty in the above entitled cause, for an order arresting the judgment.

The grounds of said motions were and the grounds of said errors in denying said motions were, and are, that said indictment does not state facts sufficient to constitute a punishable offense or any offense or crimes against the laws, or any law, [51] or against the constitution of the United States, and particularly said indictment does not state facts sufficient to constitute a violation of Section 88, Title 18, United States Code.

VI.

Said District Court erred in overruling the objections of the said defendants to the admission of any evidence on this indictment, and admitting in evidence the testimony of the plaintiff's witnesses in support of the charges set out in said indictment. The grounds of the objections and the exceptions were as follows:

Mr. Licking: Q. Mr. Nathanson, you are an employee of the United States Government?

Mr. Cannon: I object to the introduction of any evidence on this indictment on the ground it does not state an offense. I can state it very briefly to you Honor. I know the matter was raised by demurrer, but I prepared a rather lengthy brief on the expectation of this objection. I think I can point out very briefly why this indictment does not state an offense.****

The Court: For the purpose of the record, it will be denied.

Mr. Cannon: Exception. (14, 16)

VII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Steve Vincentini, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whisky over the ceiling price, and the collection of money for the amount paid for the whisky above the ceiling price. The grounds of the objections and the exceptions were as follows: [52]

I had a discussion with him (Malaby) about whisky.

Q. What did he say and what did you say?

Mr. Ames: I object to that. I will have to object, your Honor, on the ground it is incompetent, irrelevant and immaterial. (64) ****

Mr. Cannon: I just want to add a ground to the objection suggested by Judge Ames. The further objection is that it is hearsay as to all the defendants in this case. (65)****

The Court: I will allow it subject to a motion to strike and over the objection of all the counsel.

Mr. Cannon: Exception. (65)

Mr. Cannon: I assume your Honor does not care to have us repeating objections. We understand

the objection heretofore made to hearsay testimony applies also to any conversation which this witness may have had with the defendants Files and Shaeffer, as far as my client is concerned.

The Court: All right.

Mr. Cannon: Exception to the ruling. (67)

1 ***

Q. At the time you had your conversation with Mr. Files and Mr. Shaeffer when Gabrielli was there, what was said, do you remember?

Mr. Ames: I make the objection the conversation would be hearsay as far as the defendant Cain is concerned, and not competent evidence to prove the crime alleged in the indictment.

Mr. Licking: This is a conversation which I will introduce, and I intend to connect it up to the satisfaction of the Court to show that it is a statement made by conspirators during the course of the conspiracy, or to cover up the existence of a conspiracy.

The Court: Overruled. [53]

Mr. Ames: Exception, your Honor, on behalf of the defendant Cain and all the defendants. (77-78).

VIII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, William S. Johnson, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whisky over the

ceiling price, and the collection of money for the amount paid for the whisky above the ceiling price. The grounds of the objection and the exception were as follows:

Q. What was said by him? (Rocco)

Mr. Cannon: I make a general objection on behalf of all the defendants to this conversation, and to whatever questions that may be gone into on the examination with respect to this conversation had out of the presence of any of the defendants, on the ground it is hearsay.

The Court: Overruled. I will allow it under the same ruling.

Mr. Cannon: Exception.

The Court: It is going in subject to your motion to strike and over your objection. Unless it is connected up——

Mr. Cannon: I may have the exception to the whole line of testimony, your Honor?

The Court: Yes. (114-115)

IX.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Charles Ferrati, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purpose of whisky over the ceiling price, and the collection of money for the amount paid for the whisky above the [54] ceiling price.

The grounds of the objection and the exception were as follows:

Q. Do you recall what you said to Mr. Rocco and what he said to you?

A. When Mr. Johnson was finished he called me over there——

Mr. Cannon: Your Honor, I offer an objection at this time on behalf of all the defendants to this conversation, and to questions that may be asked of this witness along the same line with respect to conversations on the ground it is hearsay and has no value in the case as against any of these defendants. In anticipation of your Honor's ruling I will take an exception to it, and may I have an understanding the objection and exception runs to the entire line of testimony?

The Court: Yes. Objection overruled. (126-127)

X.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Enrico Barrotti, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whisky over the ceiling price, and the collection of money for the amount paid for the whisky above the ceiling price. The grounds of the objection and the exception were as follows:

Q. What did Rocco say when he introduced you to Burnett?

Mr. Cannon: If the Court please——

Mr. Licking: I will stipulate, if the Court please, that the same objection heretofore made by counsel is interposed to this and the Court has made the same ruling. [55]

Mr. Cannon: It is hearsay as to these defendants and we will take an exception to the ruling, and the understanding is that we have a running objection and running exception to the testimony.

The Court: Let the record so show. (132)

XI.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Frank Spenger, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whisky over the ceiling price, and the collection of money for the amount paid for the whisky above the ceiling price. The grounds of the objection and the exception were as follows:

Q. About a week, you say, before you signed the first of the papers you after signed in the transaction; what was your conversation?

Mr. Cannon: If your Honor please, I object on behalf of all the defendants except Mr. Malaby. I make the objection jointly and severally, and anticipating your Honor's ruling I would like to take an exception to an adverse ruling. I object on the ground it is hearsay as to the other defendants. If

it is agreeable with your Honor I would like to have the objection running throughout the conversation as between this witness and any other person out of the presence of any of these defendants. I take an exception to the ruling.

The Court: The objection will be overruled. I think I have indicated clearly, I attempted to, that unless it is connected up it will go out.

Mr. Cannon: I understand that. I am afraid, though, if we ever have to go to a circuit court that the circuit court [56] may not understand the force of my objection.

The Court: I think under the new rules even an exception need not be taken. (144)

XII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Martin Fuchslin, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whisky over the ceiling price, and the collection of money for the amount paid for the whisky above the ceiling price. The grounds of the objection and the exception were as follows:

Q. What was your conversation with Mr. McKinnon? (167) ****

Mr. Cannon: It is hearsay as to these defendants; it does not prove or tend to prove any issue.

Mr. Licking: That is the same objection you

have to all the similar testimony that has been introduced.

Mr. Cannon: Yes.

The Court: Overruled.

Mr. Cannon: Exception. May I have a running objection?

The Court: Unless it is connected up it will go out. (168)

(Witness continuing:)

We were talking about the whisky shortage and he said he knew where we could get some at about \$57 a case including everything.

Q. * * * * Was there any discussion at that time about the ceiling price or OPA price?

A. Well, I knew it was over the ceiling price.

Q. You knew it was over the ceiling price?

A. Yes.

Mr. Cannon: I move to strike it out as immaterial. [57]

Mr. Licking: If he knew it merely of his own knowledge,—if he knew if from the conversation.

Mr. Cannon: I move it be stricken out.

The Court: What is your objection?

Mr. Cannon: It is a conclusion of the witness that he knew it was over ceiling. No conversation to that effect.

The Court: He, as an individual, knew it.

Mr. Cannon: But his knowledge wouldn't be binding upon the defendants.

Mr. Licking: Well, I respectfully suggest, if your Honor please, that each one of these pur-

chasers, himself, became pro tanto a member of the same conspiracy, if I can prove a conspiracy for this purpose existed.

Mr. Cannon: You mean each one of these purchasers of whisky became a party to the conspiracy?

Mr. Licking: Everything they did in carrying out this particular conspiracy, certainly. You can't sell it without a purchaser, and you can't offer it for sale unless you have a purchaser.

Mr. Cannon: I think I have made my objection clear to the court. I will take a ruling.

The Court: Objection overruled.

Mr. Cannon: Exception. (169-170)

XIII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Guy Caputa, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whisky over the ceiling price, and the collection of money for the amount paid for the whisky above the ceiling price. The grounds of the objections and the exceptions [58] were as follows.

Q. What did he say and what did you say?

Mr. Cannon: At this time I object on the ground it is hearsay as far as all the other defendants are concerned, and I object to the testimony on that ground.

The Court: Overruled.

Mr. Cannon: Exception, and I reserve a motion to strike at a later period in the event it is not connected up.

The Court: Very well.

Mr. Cannon: Exception to your Honor's ruling.
(190-191)

Mr. Cannon: If your Honor please, at this time counsel and I have agreed upon the following stipulation, and that is, on all of the conversations that are being elicited from any witness which conversations are out of the presence of certain of the defendants, it will be deemed for the purpose of the record that those defendants were absent when the conversation was held, and I object to the testimony on the ground that it is hearsay and reserve a motion to strike it in the event at a later time it is not connected up.

Mr. Licking: I am perfectly willing if the Court is that that objection may be deemed taken to all conversations which I am eliciting.

The Court: Very well. (208)

XIV.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and in admitting in evidence the following exhibits, identified by various witnesses, produced by the prosecution. The said exhibits being as follows:

Government's exhibits 1; 2; 3; 3-A; 3-B; 3-C; 4; 4-A; 4-B; 5; 6; 6-A; 7; 7-A; 7-B; 8; 8-A; 9; 9-A; 10; 10-A; 11; 12; 12-A; [59] 12-B; 13; 13-A; 13-B; 13-C; 14; 14-A; 14-B; 14-C; 15; 16; 16-A; 17; 18; 18-A; 18-B; 19; 19-A; 20; 20-A; 20-B; 21; 22; 22-A; 23; 25; 25-A; 26; 26-A; 26-B; 26-C; 27; 28; 29; 30.

The grounds of the objections and the exceptions were as follows:

Mr. Cannon: It is hearsay as to all defendants. I make the objection jointly and severally on behalf of each defendant.

The Court: Your objection will be overruled.

Mr. Cannon: Exception.

(U. S. Exhibit 1 for Identification was received in evidence.)

Mr. Licking: I now offer Government's Exhibit 2 for Identification against the defendants and all of them. (629-630-631)****

Mr. Cannon: To which I object on the ground it is incompetent, irrelevant and immaterial, no proper or any foundation laid as to any defendant, and I object to it on behalf of each defendant separately on the ground it is hearsay.

The Court: Your objection will be overruled.

Mr. Cannon: Exception.

(U. S. Exhibit 2 for Identification was received in Evidence.)

Mr. Licking: May I have now Government's Exhibit 3 for Identification, the invoices covering the Vincentini transaction at Stockton? In connection with that, the Govenment's Exhibit 3-A for

Identification, consisting of certified check debit, receipt signed by Mr. Malaby referring to the Files escrow, and also a receipt signed by Mr. Files for \$2100 dated April 20, 1944; also as part of that a photostatic copy of a note signed by Mr. Files and Mr. Shaeffer, defendant Files and defendant Shaeffer, dated June 21, 1944, agreeing to pay \$3,668 to Steve Vincentini. [60]

Mr. Cannon: I make the same objection on behalf of all defendants jointly and severally, and particularly to the promissory note of June 21, 1944 attached as part of that exhibit offered, it being a note signed by Mr. Files and Mr. Shaeffer, on the ground it is hearsay as to anybody other than those two defendants.

The Court: The objection is overruled.

Mr. Cannon: Exception.

Mr. Licking: I also offer 3-B under the same statement of facts as this.

Mr. Ames: If your Honor please, I particularly make a further objection on the part of the defendant Cain and also for the benefit of all the defendants and for and on their behalf. I object to the introduction in evidence of any of these vouchers or bills, whatever they may be called, invoices, for the additional reason that this particular one, Exhibit 3, and all like it, do not in any degree show any violation whatsoever of the statute upon which the prosecution lies. On the contrary, these invoices show that these goods were sold at the ceiling price and nothing more. I make that general objection. I am going to make an objection to

all of these documents for the reason that they do not prove any participation in any crime whatsoever.

The Court: The objection will be overruled.

Mr. Ames: Exception.

(U. S. Exhibits 3, 3-A and 3-B for Identification were received in evidence.)

Mr. Licking: I also offer Government's Exhibit 3-C under the same statement of facts.

Mr. Cannon: I make the same objection on the same grounds.

Mr. Ames: I make the same objection on the same grounds.

The Court: The objection is overruled. [61]

Mr. Cannon: Exception.

Mr. Ames: Exception.

(U. S. Exhibit 3-C for Identification was received in evidence.)

Mr. Licking: I am perfectly willing to stipulate in the record, your Honor, that the same general objection heretofore offered by counsel to the exhibits I have offered be entered in the record.

Mr. Cannon: As far as my client is concerned, we object to the offer of each and all of these exhibits that counsel has offered or is about to offer, and we make the objection on behalf of each and every defendant, jointly and severally, on the following grounds: that they are incompetent, irrelevant and immaterial, because they have no bearing upon any issue in the case, and on the further ground that they are hearsay as to these defend-

ants; on the further ground that they are or could have no probative value on the proving of any conspiracy, because they relate to past transactions, and after the completion of the crime which the indictment alleges was committed. In other words, many of these documents and transactions relate to occurrences subsequent to the date upon which the alleged conspiracy was complete, the crime of conspiracy was complete.

Mr. Licking: What date do you contend the conspiracy was complete?

Mr. Cannon: The date when the Court finds, if it does so find, that the first overt act alleged in the indictment was committed. I make that statement so there will be no question of the stand we take in the matter. Counsel yesterday sought to establish——

Mr. Licking: I didn't particularly seek to do it, counsel.

Mr. Cannon: If I may have that running objection on behalf of each and all of the defendants, it may be understood [62] that the objection goes to the offer of each and all of them, and I will not interrupt any more.

The Court: Your objection will be overruled.

Mr. Cannon: May I have a stipulation?

Mr. Licking: Yes, I am perfectly willing to stipulate for the purpose of the record that that objection may be considered as a running objection to all of the exhibits I propose to introduce.

The Court: Very well.

Mr. Ames: And so far as the documents are concerned, they could tend to prove no crime as alleged in the indictment. I make that objection on behalf of the defendants.

The Court: The objection is overruled.

Mr. Ames: Exception.

XV.

Said District Court erred in denying the motion of the defendants to strike from the record certain testimony offered and received on behalf of the prosecution. The grounds of the motion and the exception to the ruling of the Court being as follows:

Mr. Sheffy: At this time, your Honor, I want to present a motion on behalf of all of the defendants, jointly and severally, to strike from the record certain testimony as to conversations that were admitted by the court subject to a motion to strike, those conversations being the conversations that were had with some of the defendants with third persons not in the presence of the other defendants.

I think I can make the motion general after stating, making reference to the testimony of one or two of the witnesses. For example, the witness Steve Vincentini, who testified he contacted Mr. Malaby in his apartment and talked about whisky, that there was nobody present but himself and Mr. Malaby, and [63] the court permitted the witness to state what conversation was had in Mr. Malaby's presence, subject to a motion to strike, and later he said as to the conversation with Malaby the mo-

tion would apply to all the defendants except the defendant Malaby. He testified that after talking with Mr. Malaby in this room that he then went to the office and talked to Mr. Files, Mr. Malaby and Mr. Shaeffer, and the court permitted, subject to a motion to strike, the conversation that was had at that place to be given, and in that instance the motion would be on behalf of the other defendants who were not present at that time.

The motion, therefore, is presented in each instance on behalf of those defendants who were not present at the time the conversations were had. I can go through my notes and take up each witness, witness by witness.

Mr. Licking: I am perfectly willing to stipulate that we haven't introduced testimony relating to any conversation at which all of the proposed defendants were present. There has apparently been no such conversation.

Mr. Sheffy: That is true, Mr. Licking, but in order to have the matter straight in the record, instead of taking each witness, witness by witness, I believe that I can make the general motion on behalf of the defendants who were not present at conversations testified to by one or more of the defendants (sig. witnesses), when the other defendants were not present, and as to all of that testimony I present to the court now a motion to strike that testimony. May it be stipulated, Mr. Licking, that my motion goes to the testimony of all of the witnesses?

Mr. Licking: If it is agreeable to the court, and the record may also indicate that that objection has been introduced as to each conversation as to which there has been testimony, and the objection has been entered and a motion to strike is [64] now made on behalf of those defendants who were not present at that conversation on the ground that as to them, I presume, it is hearsay.

Mr. Sheffy: Hearsay; and on the further ground the statements of one of the alleged conspirators not in the presence of the others cannot be used to prove the conspiracy.

The Court: Is the matter submitted?

Mr. Sheffy: Yes, your Honor.

The Court: The motion will be denied.

Mr. Sheffy: Exception. (654-655-656)

Mr. Cannon: If the Court please, may I just offer this further suggestion, that with respect to the motion which is made on behalf of all of the defendants that we call your Honor's attention particularly to all of the testimony that was introduced in evidence here bearing on any transaction or any conversation had, and also with respect to any documentary evidence introduced bearing upon a transaction subsequent to April 24, 1944, and make the motion specifically in behalf of each defendant not definitely connected by his personal presence with any transaction occurring subsequent to April 24, 1944.

* * * *

The Court: The motions, and each of them, will be denied.

Mr. Cannon: Exception in each case.

Mr. McDonald: May it please the Court, on behalf of the defendant W. O. Files I wish to adopt on his behalf and make part of this record each and every motion made by Mr. Sheffy and Mr. Cannon.

I further move to strike from the record all evidence, oral or documentary, in reference to the transaction involving the witness Figone, on the ground the same is incompetent, [65] irrelevant, and immaterial, and hearsay as to the defendant Files, as the conspiracy or no part thereof has been proven.

I also wish to make the motion on his behalf on the same grounds in reference to the witness McNeil; upon the same ground as to the witness Pete de Georgis; upon the same ground as to the witness Pete Reali; upon the same ground as to the witness Bryden; upon the same ground as to the witness Manuel Costa; upon the same ground as to the witnesses Lichtenberg and Johnson; upon the same ground as to the witness Barotti; upon the same ground as to the witness Ferretti; upon the same ground as to the witness Elliot Smith; upon the same ground as to the witness Caputa; upon the same ground as to the witness Kusalo; upon the same ground respecting a man by the name of Abrams, from Santa Rosa; upon the same ground as to any transaction involving John Di Silva; upon the same ground as to a certain money order sent to the witness Rocco; upon the same ground as to the letter from Malaby to the witness Burnett; and upon the same ground as to any testimony in refer-

ence to a receipt from Malaby to a man named Sargiani.

Mr. Licking: Submitted.

The Court: Motions will be denied.

Mr. McDonald: Exceptions. (660)

XVI.

Said district court erred in denying the motion of the defendants to strike from the record certain testimony offered and received on behalf of the prosecution. The grounds of the motion and the exception to the ruling of the court being as follows:

Mr. Cannon: Exception taken jointly and severally.

At this time, if the Court please, I make at the conclusion of the entire case, I move the Court to dismiss the indictment as to each defendant and to acquit each defendant on the grounds heretofore stated, first, the indictment does not state any [66] offense punishable by any laws of the United States or under the Constitution of the United States. I make the motion further on the ground the indictment is so indefinite and so uncertain as to be insufficient to place the defendants or any of them on notice of what they are required to meet. And I also make the motion on the ground that at the conclusion of the entire case there isn't any sufficient evidence upon which your Honor could find these defendants or any of them guilty of the offenses charged. (835)

* * * *

The Court: —it is clearly the duty of the Court to deny your motion. (838)

Mr. Gillen: Very well, your Honor.

Mr. Cannon: I take exception on behalf of each defendant jointly and severally to the denial of the motion.

XVII.

Said District Court erred in denying the motion made by the defendants to require the prosecution to elect on which of the overt acts set out in the Indictment the prosecution would rely for a conviction. The grounds of the motion and the exception to the ruling of the court being as follows:

Mr. Cannon: At this time I make a motion to require the prosecution to elect on which of the overt acts that are specifically alleged in the indictment it will rely for a conviction in this case.

Mr. Licking: All of them. (838-839)****

Mr. Licking: I said all of them, counsel. (839)

* * * *

The Court: All of the overt acts alleged in the indictment.

* * * *

Mr. Cannon: I take exception to your Honor's refusal to require the prosecution to elect.

During the course of this trial at one time counsel suggested [67] that he was abandoning all of the overt acts except the last one alleged, and furthermore, there is the objection I have heretofore made from time to time as to the propriety of the introduction in evidence of certain documentary evidence as against all of the defendants and as to the

propriety of the introduction in evidence of certain documentary evidence as against all of the defendants and as to the propriety of the admission in evidence of certain conversations that have occurred between certain of the defendants out of the presence of other of the defendants after one of the alleged overt acts had been completed. That is the basis of the motion.

Mr. Licking: I submit it.

Mr. Cannon: I assume your Honor will not require him to elect on which particular one at this time. I take exception.

Mr. McDonald: If your Honor please, I thought you were looking at me when you made that suggestion. Just for the purpose of the record, I want to join in the motions heretofore made by other counsel.

The Court: Very well.

Mr. McDonald: I except to your Honor's rulings. (839-840-841)

Each and all of the foregoing Assignments are made by Nathan Newman, W. O. Files, and Burt Cain, jointly and severally, as to each of said Assignments, and as to each of said defendants.

Wherefore, the said defendants, Nathan Newman, W. O. Files, and Burt Cain, by reason of the errors aforesaid, jointly and severally pray that the judg-

ment and the sentences against and upon them may be reversed and held for naught.

.....

Nathan Newman

.....

W. O. Files

.....

Burt Cain

CANNON & CALLISTER

By REED E. CALLISTER

FRED McDONALD

S. E. SHEFFEY

Receipt of a copy of foregoing Assignment of Errors is hereby admitted this 11th day of April, 1945.

FRANK J. HENNESSY

U. S. Attorney

Per T. S. [68]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 11th day of April, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause]

SETTLING OF BILL OF EXCEPTIONS
CONTINUED TO MAY 1, 1945

This case came on regular this day for settling bill of exceptions. On motion of Fred. McDonald, Esq., for the defendants, and with the consent of William E. Licking, Esq., Assistant United States Attorney, it is Ordered that said matter be continued to May 1, 1945.

On motion of Mr. McDonald, it is Ordered that the defendant Nathan Newman may leave the jurisdiction of this Court, in accordance with a signed order this day filed. [69]

Receipt of a copy of Bill of Exceptions is hereby admitted this 11th day of April, 1945.

FRANK J. HENNESSY

U. S. Attorney

Per T. S. [70]

[Title of District Court and Cause.]

NOTICE

To Frank J. Hennessy, United States Attorney,
and William E. Licking, Assistant United States
Attorney:

Sirs:

You will please take notice that the foregoing

constitutes and is the proposed Bill of Exceptions of the defendants and appellants Nathan Newman, W. O. Files and Burt Cain, in the above entitled action, and that said defendants and appellants will ask the allowance of the same.

DAVID H. CANNON,

Attorney for said defendants
and appellants

FRED McDONALD,

Attorney for defendant and
appellant W. O. Files

S. E. SHEFFEY,

Attorney for defendant and
appellant Burt Cain

[Endorsed]: Filed April 28, 1945. [71]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that this cause came on regularly for trial on the 23rd day of January, 1945, before the Honorable Michael J. Roche, Judge of said Court, sitting without a jury, a trial by jury having been expressly waived by the plaintiff and the defendants; the following appearances were made:

Counsel appearing:

For the Government: William E. Licking, Esq.

For Defendant Malaby: J. W. Ehrlich, Esq.

For Defendant Newman: David H. Cannon, Esq.

For Defendant Lowenthal: Albert McGuire, Esq.

For Defendant Shaeffer: Leslie C. Gillen, Esq.

For Defendant Rocco: Agnes O'Brien

For Defendant Files: Fred McDonald, Esq.

For Defendant Cain: Alden Ames, Esq. and S. E. Sheffey, Esq.

Whereupon, the trial of said cause proceeded and the following proceedings were had, and testimony, oral and documentary, was offered by the respective parties, and admitted by the court.

At this point the Defendant Malaby, with the consent [72] of the Court, withdrew his plea of not guilty heretofore entered, and entered a plea of guilty, and was released on his present bond, and the defendant Rocco was, upon motion of his counsel, and without objection by the prosecution, granted a severance (2, 3).

JOSEPH NATHANSON

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

Mr. Licking: Q. Mr. Nathanson, you are an employee of the United States Government?

Mr. Cannon: I object to the introduction of any evidence on this indictment on the ground it does not state an offense. I can state it very briefly to your Honor. I know the matter was raised by de-

(Testimony of Joseph Nathanson.)

murrer, but I prepared a rather lengthy brief on the expectation of this objection. I think I can point out very briefly why this indictment does not state an offense. * * * *

The Court: For the purpose of the record, it will be denied.

Mr. Cannon: Exception. (14, 16)

(Witness continuing:)

I am in the employ of the United States Government as a price specialist in the San Francisco District Office of the Price Administration, and as such am familiar with the manner and method of arriving at the ceiling prices on various commodities such as whisky. These prices for whisky are governed under the provisions of the maximum price regulation 445 as amended, and the price at the wholesaler's level is fixed at the place of business of the wholesaler under the applicable regulation. Exhibit 1 for Identification is a certified copy of papers in the Office of Price Administration (17).

From this document and my knowledge of the manner and [73] method of price fixing, I can state the ceiling price in this district of whisky for delivery by a Los Angeles wholesaler to a retailer in this district.

Mr. Cannon: I object on the ground it is asking for testimony based upon a hearsay document as far as the defendants are concerned.

The Court: If he knows he may answer.

Mr. Cannon: Exception. (18)

(Witness continuing:)

(Testimony of Joseph Nathanson.)

The ceiling price on this particular whisky on sales by a wholesaler to a retailer is \$273.63.

Cross Examination

By Mr. Cannon:

That was the ceiling price in force from April 1944 up to the present time, and includes all Federal and State excise taxes, but not sales tax. The ceiling price on a particular brand of whisky is not published in any bulletin issued by OPA, but is fixed by the application of certain rules to the manufacturer's costs. When a retailer makes a purchase he would know what the ceiling price was from the invoice itself. As far as the retailer was concerned the invoice issued by the seller would not be the only source of information by the retailer. Under the regulation the wholesaler is required to keep his customers' records, showing how he established the price for all commodities which he sells. If any one were to determine the ceiling price of this liquor that knowledge would have to come from the wholesaler's record (21).

Redirect Examination

By Mr. Licking:

The wholesaler is required by law to apply a certain figure to his cost, and set his ceiling price thereby, and is required to register that price with the Office of Price Administration. Exhibit 1 for Identification is that registration [74] on that particular whisky with the Office of Price Administration.

Q. Well, the OPA regulation, then, sets up a formula and the different costs and other factors are applied and required to be complied with by the manufacturer, by the wholesaler, and by the retailer? A. Correct. (21)

(Witness continuing:)

In my judgment there was a ceiling price for McHenry whisky of the type described in Exhibit 1 for Identification at \$37.63 per case of fifths (28).

Recross Examination

By Mr. Cannon:

The ceiling price that I gave a little while ago would be the price in effect on April 1, 1944 in this district. The document which you show me was sent by the Office of Price Administration in the San Francisco district to all retail off sale liquor licensees on or about May 15, 1944.

Mr. Cannon: I offer the document in evidence.

Mr. Licking: I object to it on the ground it is immaterial for any purpose and not cross-examination.

The Court: I will give him a record on it. It may be admitted and marked.

(The list was marked Defendants' Exhibit A in evidence.)

Mr. Licking: Exception. (30)

(Witness continuing:)

I do not know whether or not there was any other circular sent to any of the licensees out of the San Francisco office of the OPA on any other liquor.

CLYDE BIRD

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Clyde Bird and I am an investigator for the Office of Price Administration in the San Francisco District, [75] and as such conducted an investigation leading up to the indictment in this case. In connection with my investigation I contacted one Martin Fuchslin at 338 Third Street, San Francisco, where he did business as the Montana Club, and I obtained from him certain documents marked and offered as Exhibit 2 for Identification (33) and I interviewed Steve Vincentini and Vincenzo Gabrielli at Stockton, California. Steve operated Steve's Inn at 120 East Weber Avenue, Stockton, California, and Gabrielli is a partner of Steve in some of the operations. I secured certain documents from them or from Vincentini's attorney, which I now mark as United States Exhibit 3 for Identification.

These are photostatic copies of the originals of certain of those documents, and are true photostats, and they are now marked United States Exhibit 3-A for Identification.

I also interviewed one Frank Spenger (39) who operates the Spenger Fish Grotto at 1919 Fourth Street near Jefferson Avenue in Berkeley, and I secured from him a check and a receipt and other papers which have been marked United States Ex-

(Testimony of Clyde Bird.)

hibit 4 for Identification. I also received from Frank Spenger a check in amount of \$13,736 payable to cash, and a receipt signed by W. O. Files for that amount. They are marked Government's Exhibit 4-A for Identification.

I also interviewed one Victor Figone (40) of 455 San Pablo Avenue, El Cerrito, doing business as the Six Bells Cafe, and I obtained certain documents from him which have now been marked U. S. Exhibit 5 for Identification.

I interviewed one Guy Caputa (41) and obtained from him certain documents marked U. S. Exhibit 6 for Identification, and a photostatic copy of a receipt signed "W. O. Files" now marked U. S. Exhibit 6-A for Identification.

I interviewed Robert C. Thomason (42) at 309 San Pablo [76] Avenue, El Cerrito, doing business under the name of Hunter's Lodge, and I secured from him certain documents. They have been marked U. S. Exhibit 7 for Identification. I also received a receipt signed "Charles Malaby" and offer it as U. S. Exhibit 7-A for Identification.

I also interviewed Margaret McNeil (43) at 740 San Pablo Avenue, El Cerrito, doing business under the name of the Big Boy Barbecue, and I obtained certain documents from her which have been marked as U. S. Exhibit 8 for Identification.

I interviewed Pete de Georgis (43) at 1614 San Pablo Avenue, El Cerrito, doing business under the name of Miami Inn, and I received certain docu-

(Testimony of Clyde Bird.)

ments from him and they have been marked U. S. Exhibit 9 for Identification (46).

Mr. Licking: * * * If your Honor please, I just had a discussion with Mr. McDonald and Mr. Cannon. I have some fifteen more sets of documents which I propose to identify by this witness and to offer for identification. * * * I have some fifteen more sets of them, and I might make a blanket offer of them. Yes, I do that. * * *

The Court: Is that agreeable to all counsel?

Mr. McDonald: It is agreeable to me, your Honor.

Mr. Ames: No objection. (44, 45, 46)

(Witness continuing:)

I also interviewed the following:

Pete Reali, Central Cafe, 402 Fourteenth Street. I did not secure any documents from him; Mr. Bryden, 1620 San Pablo Avenue, El Cerrito, doing business under the name of Jungle Inn, and obtained documents from him, marked as Government's Exhibit No. 11 for Identification; also John Di Silva (46) at 1182 East Fourteenth Street, San Leandro, but got no documents from him; also Nello Nomellini and Luigi Di Ricco (47), at 4822 Mission Street, under the trade name of El Lido Bocce Ball [77] Alley, and the Bluebird Cafe, 3149 22nd Street. Ricco owns both taverns and Nomellini is the manager of the Bluebird. I obtained certain documents from them which are marked U. S. Exhibits No. 12 and 12-A for Identification.

(Testimony of Clyde Bird.)

I also interviewed Manuel Costa and Manuel Costa, Sr., (47, 48) at 9800 East Fourteenth Street, Oakland, California, and obtained documents from them which are marked U. S. Exhibit No. 13 for Identification.

I also interviewed Amaro Pitta (48) at 737 Kirkham Street, Oakland, and obtained certain document marked U. S. Exhibit 14 for Identification.

Also R. Lichtenberg and W. Johnson, doing business as Boyes Hot Springs, Sonoma County, California (48), and obtained certain documents from them marked U. S. Exhibit 15 for Identification.

Also Enrico Barotti (49) doing business as Charles Cafe in Santa Rosa, and received certain documents from him that have been marked U. S. Exhibit 16 for Identification and U. S. Exhibit 16-A for Identification.

Also Charles Ferretti in Sonoma, doing business as Charles Cafe, and obtained from him certain documents which have been marked for identification as U. S. Exhibit 17 for Identification.

Also J. Gibson and Elliot Smith (50) doing business at 1782 Seventh Street, Oakland, California, and obtained certain documents which have been marked U. S. Exhibit 18 for Identification.

Also Jack Cardinelli (50), in Richmond, but I did not get any documents from him.

Also Joseph Porfido (51) and obtained a check drawn on the Bank of America dated June 18, 1944, payable to Pete de Georgis for \$595, signed Prudence Porfido, and marked U. S. Exhibit 19 for

(Testimony of Clyde Bird.)

Identification; and I also obtained certain [78] other documents marked U. S. Exhibit 19-A for Identification.

Also John P. Kusalo, (51) at 10701 East Fourteenth Street, Oakland, doing business under the trade name of G & M Coffee Shop, and I obtained certain documents from him, which have been marked as U. S. Exhibits Nos. 20 and 20-A for Identification and 20-B for Identification.

Also Mr. Abrams from Santa Rosa. He has now gone to Seattle. This is one of the transactions that Rocco handled and I received from Abrams certain checks in the course of my investigation. These are marked U. S. Exhibit 21 for Identification (53).

Also I interviewed Charles Malaby, and obtained certain original letters of which photostats were taken, and which photostats have been marked U. S. Exhibit 22 and 22-A for Identification (54).

I received the two exhibits marked U. S. Exhibit 3-B for Identification from Mr. Charles Malaby. I also interviewed Mr. Cain and obtained a copy of his agreement with Mid-Valley Distilling Corporation (56) which has been marked as U. S. Exhibit 23 for Identification.

Cross Examination

By Mr. Ames:

I am an investigator for the Office of Price Administration, attached to the San Francisco District Office. In this case I obtained the necessary permission to go to Los Angeles to investigate the mat-

(Testimony of Clyde Bird.)

ter. I got a list of customers of Mr. Cain's from the Alcohol Tax Unit in San Francisco. I did not investigate the records of the Alcohol Tax Unit. I merely obtained a list of some people who had received liquor from the International Import Company (59). This was given to me by John Becker of the Alcohol Tax Unit.

(Witness excused.) [79]

STEVE VINCENTINI

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Steve Vincentini, and I am in the restaurant business, with a bar in connection. I have a partner by the name of Vincenzo (61). He used to be my partner, but now he just helps me out. Last year I ordered some McHenry whisky. I talked to some fellow about whisky and then I came to San Francisco and met Malaby. This fellow had given me one of his cards. I saw Malaby in San Francisco.

(At this point U. S. Exhibit No. 24, being a picture of Mr. Malaby, was offered for identification.)

(Witness continuing:)

I had a discussion with him about whisky.

Q. What did he say and what did you say?

Mr. Ames: I object to that. I will have to ob-

(Testimony of Steve Vincentini.)

ject, your Honor, on the ground it is incompetent, irrelevant and immaterial. (64) * * *

Mr. Cannon: I just want to add a ground to the objection suggested by Judge Ames. The further objection is that it is hearsay as to all the defendants in this case. (65) * * *

The Court: I will allow it subject to a motion to strike and over the objection of all the counsel.

Mr. Cannon: Exception. (65)

(Witness continuing:)

He had me taste the McHenry whisky. I ordered 75 cases; 50 cases 100 proof, and 25 cases 85 proof. I gave him the money, and he took me to a real estate office of Files and Shaeffer (66) who are now in court. Shaeffer, Files, Malaby, myself, and Gabrielli, were in the office when I told Malaby I wanted to put my money in escrow, and when I received my whisky [80] I would give the rest of the dough.

Mr. Cannon: I assume your Honor does not care to have us repeating objections. We understand the objection heretofore made to hearsay testimony applies also to any conversation which this witness may have had with the defendants Files and Shaeffer, as far as my client is concerned.

The Court: All right.

Mr. Cannon: Exception to the ruling. (67)

(Witness continuing:)

I put up \$2690 and he gave me a note for it and I went out. Malaby told me I would receive the

(Testimony of Steve Vincentini.)

whisky in 60 days. Files and Shaeffer were there. The money I paid was not for the full price of the whisky. It was paid just to be sure I was going to get the whisky. The photostatic copy of the order slip has my signature on it, and shows a total price of \$2,237 for 50 cases of McHenry, and 25 cases of another kind of McHenry (69). At that time I got the receipt signed by Mr. Malaby, and which is marked Exhibit 3-A for Identification, and which is for \$2,100, dated April 20, 1944, which is the day I went down to the office. The money was turned over to Malaby or Files or Shaeffer. All three were in the office and Files gave me the receipt, which says: "Received \$2,100 deposited with W. O. Files, 309 Kearny Street, for certain transaction." * * * "If not completed within 60 days to be refunded."

(At this point photostat copy of purported purchase order to the International Import Company was marked as U. S. Exhibit 3-C for Identification.)

(Witness continuing:)

Some of the whisky was \$35 a case, and some \$48 a case. Referring to Government's Exhibit 3-C for Identification it sets out the money that I was supposed to pay when I got my whisky. [81] The \$2,500 I paid in the first place was a payment over and above this other price. Afterwards I got 25 cases of whisky which was the low priced whisky, I think, and I paid for it by certified check for \$926.05 (73-A). I later got 25 cases but could not use it

(Testimony of Steve Vincentini.)

and I sent it back to the company. After my correspondence with the International Import Company I made a further effort to get my money back, and turned the case over to my lawyer. I saw Mr. Files and Mr. Shaeffer afterward and had a conversation with them, which was two days before the note was given to me. Gabrielli was with me. I had a conversation.

Q. At the time you had your conversation with Mr. Files and Mr. Shaeffer when Gabrielli was there, what was said, do you remember?

Mr. Ames: I make the objection the conversation would be hearsay as far as the defendant Cain is concerned, and not competent evidence to prove the crime alleged in the indictment.

Mr. Licking: This is a conversation which I will introduce, and I intend to connect it up to the satisfaction of the Court to show that it is a statement made by conspirators during the course of the conspiracy, or to cover up the existence of a conspiracy.

The Court: Overruled.

Mr. Ames: Exception, your Honor, on behalf of the defendant Cain and all the defendants. (77-78)
(Witness continuing:)

He says, "You got to give me time until tomorrow." I then left Gabrielli in San Francisco and I went back home, and afterwards I got a note signed by Files and Shaeffer, Exhibit 3-A is that note, for \$3,668, which is the full amount that I put in. [82]

(Testimony of Steve Vincentini.)

Mr. Gillen: I move the question and the answer be stricken as having absolutely no bearing on the proof of the charge set forth in the indictment.

Mr. McDonald: I join in the objection.

Mr. Ames: I join in the objection, and also that it is incompetent, irrelevant and immaterial.

The Court: Overruled. Let the question and answer stand.

Mr. Ames: Exception. (79)

(Witness continuing:)

Exhibit 3-A for Identification is a correct copy of the receipt that I got from Mr. Files. The original of these documents and the correspondence I had with the International Import Company are with my attorney.

Cross Examination

By Mr. McDonald:

I first found out about this transaction in whisky from some gentleman now in France. This man gave me a card that had Malaby's address on it, and he told me to go there and I could buy whisky from him. I saw Malaby and discussed the purchase of whisky with him in his apartment at 805 Bush Street, Apartment 314. I told him how much whisky I wanted, and he told me how much whisky he would be able to get me, and we discussed the price, and then I left the apartment and went down to the office on Kearny Street. I had completed my deal with Malaby when I left the apartment,

(Testimony of Steve Vincentini.)

and I went down and deposited \$2,100. While in the apartment we fixed up the amount of the whisky, and what it would cost, when I was going to receive it, and what I was to pay, but I did not want to give the money to him, as I wanted to put it in escrow.

Cross Examination

By Mr. Gillen:

When I went down to the office on Kearny Street with Malaby, Gabrielli was with me and another friend from Stockton, and Files and Shaeffer. It is not a fact that the first time I saw [83] Shaeffer was the day that I was there demanding a note. I saw him before, when I made the deal for the whisky. That was the first time I saw him. (83) The second time I went down to 309 Kearny Street was about 60 days after that, or the day before the 60 days, because I had not received any whisky. Files and Shaeffer were both there then. I came with my partner, Gabrielli, and another fellow from Stockton. I was angry. I wanted my money back because I did not get the whisky (84). We had our coats off. I talked to Mr. Files alone. Mr. Shaeffer was in the office. I told him if I did not get the money from then I would get the law. It is not a fact that when I went there I threatened Mr. Files while he was alone. I am sure Shaeffer was there. I did not go back myself the next day. I went to Stockton, and left my partner, Gabrielli, in San Francisco

(Testimony of Steve Vincentini.)

that day. I never saw Files and Shaeffer any other time. My partner came back with the note and said that he would not give the money but gave a note.

Redirect Examination

By Mr. Licking:

The first time I went to the office with Malaby the money was turned over in escrow, when Malaby, Files, and Shaeffer were there. I gave the money in cash and said, "This is supposed to be for some whisky deal. I want you to keep the money for this boy for sixty days." (86) When I went down with Malaby I had not already given him the money. I gave the money to Files. Files wrote the receipt himself. I was supposed to get 50 cases of 100-proof whisky, and 25 cases of 85-proof, in sixty days, and that was explained at that time to Files and Shaeffer, I am sure.

Recross Examination

By Mr. McDonald:

I am sure that the amount of whisky I was to get was discussed in the office; it was discussed before I go to the real estate office (87). I had the order when I went to the office. [84] Mr. Files made out the receipt. I gave him the money. The first receipt was given to me by Malaby and the other receipt was given to me by Files. Both of them were given to me in the office.

(Witness excused.)

VINCENTO GABRIELLI

a witness for the Government, being duly sworn, testified:

My name is Vincenzo Gabrielli, and I live at 1421 North Stanislaus, Stockton. I have done nothing since last year when I got hurt. Before that I was a molder and working on a newspaper. I was also in the restaurant and bar business in 1939 with Steve Vincentini whom I have known since 1924 or 1925. Occasionally I help Steve out, once in a while. I made two trips to San Francisco with him. The first time he came to make a deal on some whisky. I went with Steve to Mr. Malaby's apartment on Bush Street. Steve and Malaby talked and I am not sure whether any papers were made then or not. I only heard part of what was said. I do not remember the date. I do not remember how much was to be paid a case. I saw the money paid over to Malaby. I guess it was \$2100 or \$2200. It was for whisky. I do not know what the understanding was between Steve and Malaby. Steve and Malaby left me in the lobby of the apartment house and were gone about half to three-quarters of an hour and came back and we got in the car and went back to Stockton. Later Vincentini received some of the whisky which was stopped by the State as unfit for human consumption (93), so in 59 days after my first trip, I and a young man from Stockton came down with Vincentini to try to get the money back, and we went

(Testimony of Vincenzo Gabrielli.)

to the office of Shaeffer and Files, whom I had never seen before. They are both in the courtroom now. Vincentini tried to get the money back. None of us were mad; and none of us had our coats off. When we first came in [85] Vincentini spoke first to Files. I have Vincentini's receipt given to him by Files covering the money put in escrow (96). Government's Exhibit 3-A for Identification looks like that paper. It reads: "April 20, 1944. Received from Steve Vincentini, \$2,100 deposit on transaction, 60 days to complete. W. O. Files" (96). Steve said he came down to get his money back because the sixty days was over and he said he had received 25 cases of whisky which were worthless and the State had confiscated it. Files said he couldn't give him the money that day, because the money was deposited in the safety deposit box, and another man, Newman, had a key; that Files had one and the other man had another key. He promised to get the money the next day, and telephoned to Los Angeles. I was there when he telephoned long distance, and I believe he asked for Cain, if I don't mistake the name. I do not remember whether I heard the conversation. We were supposed to get the money the next day, so Vincentini told me to stay in San Francisco and he would go back to his place of business. The next day I went there alone, and after a few seconds, Vincentini sent the other man down to look out for me, to assist me in requesting the money back. Files was in the office. It was 2 o'clock.

(Testimony of Vincenzo Gabrielli.)

Shaeffer was there and I talked plenty with him. Newman was not there. I said I either wanted the money or wanted security or I would call a friend of mine who was an attorney, and they tried to scare me with publicity. I told them I didn't worry, that I had been with a newspaper for thirteen years, and I knew all about publicity. I couldn't get anything. Files asked me if I wanted to talk to this man in New York at the Waldorf Astoria (102), and I told him was not interested, and finally told the man that was with me that we would go, and Shaeffer came out and said that they would give me a note. Government's Exhibit 3-A for Identification is a photostat copy of the note [86] that I was given at that time.

Cross Examination

By Mr. McDonald:

I went up to the apartment with Steve Vincentini and saw Steve give Malaby \$2100. I was not angry when I went to Mr. Files' office with Vincentini and this man Fred. I insisted on getting either the money or security for the sale.

Cross Examination

By Mr. Gillen:

I was interested in getting the money back, and I went there 59 days from the date of the receipt, and Steve said that tomorrow would be 60 days and that the deal would not go through. He had received about 25 cases which the State had confiscated, and he wanted his money back. When I

(Testimony of Vincenzo Gabrielli.)

worked on a newspaper in Stockton I solicited advertising, and I told Files and Shaeffer that I was with a newspaper in Stockton, but I did not tell them that I would give them very bad publicity, but told them I was not scared of publicity. I did not hear Vincentini mention any threat. I made none and neither did Fred. I told them I was going to see an attorney. The first day I was there Files placed a call to Los Angeles, in my presence, and talked to some person over the phone, but that talk did not interest me and I did not pay any attention to what was said. I do not know that he was connected with Los Angeles. The next day when I was there in Files' office he told me he had put in a call to New York, but I was not there when he did it.

Redirect Examination

By Mr. Licking:

Files phoned Los Angeles, and he said he had talked to Cain in Los Angeles, and that Mr. Newman was in San Diego and would not be back until tomorrow at 2 o'clock; but that when he came back they would wire the money, and said if I did not believe it I could talk to Williams. I told him I did not know Williams, I did not know Cain, and I did not know Newman.

(Witness excused.) [87]

WILLIAM S. JOHNSON,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

I run the Boyes Springs resort (112). My partner is Rudolph Lichtenberg. I know Rocco but I do not know any of the men now on trial. I never met Malaby until this morning. Rocco is the only one I have met. I testified before the Grand Jury. In 1944 I purchased, or agreed to purchase, some McHenry whisky, and first negotiated with Rocco. This was last year, in the Spring. I imagine in March. I met Rocco in Santa Rosa, and I discussed with him the possibility of getting some whisky.

Q. What was said by him?

Mr. Cannon: I make a general objection on behalf of all the defendants to this conversation, and to whatever questions that may be gone into on the examination with respect to this conversation had out of the presence of any of the defendants, on the ground it is hearsay.

The Court: Overruled. I will allow it under the same ruling.

Mr. Cannon: Exception.

The Court: It is going in subject to your motion to strike and over your objection. Unless it is connected up——

Mr. Cannon: I may have the exception to the whole line of testimony, your Honor?

(Testimony of William S. Johnson.)

The Court: Yes. (114-115)

(Witness continuing:)

I told him I had heard there was a possibility of getting some whisky, which we needed badly, and asked him if he knew anything about it. He told me he did and knew of a connection where it might be possible to get some. He had a little sample there, labeled "McHenry" Blended. I tasted it. It was not too [88] bad. He said he wanted a deposit down and the balance would have to be paid by certified check (116). He said an invoice would be given covering the balance but the first money I would have to give him in cash. I did not know what the ceiling price of the whisky was at that time, and he said the remaining money to be paid on the whisky would be paid by an invoice coming through from the company that was going to deliver the whisky. He said the whisky would be \$57.50 a case, plus the freight. At that time I did not sign anything but I gave him \$1030 as a down payment on 50 cases, and I later received 50 cases. Refreshing my recollection from Government's Exhibit No. 15 for Identification, I would say that we paid P.M.T. \$1839. Before I received the merchandise and after my discussion with Rocco, and after my deposit of the money with him, I did not have any conversation with any one else about it. I got no receipt from Rocco for the \$1030.

(Witness excused.)

RUDOLPH LICHTENBERG,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Rudolph Lichtenberg, and I am a partner with William Johnson in the Boyes Springs resort. In the Spring of last year I had a transaction for the purchase of some McHenry whisky. In that connection I met Rocco, Malaby and Newman. I would not know Newman because I saw him just a moment. Malaby is the one I did business with, and he introduced me to Newman, but I do not know Newman's first name. Rocco brought Malaby down. I could not say whether the Newman now on trial is the man introduced to me or not. When they came down it was the latter part of May, I believe. The papers that were presented to me when Rocco came down were an invoice covering 50 cases of McHenry, fifths, at a unit price of \$30.07, total of \$1809.50 [89] (122) and the second is a receipt for money for merchandise to be delivered, the balance due being \$1809.50. Later we received the whisky and paid for it. It came by truck and we paid some \$30 for freight and a second check for \$1834 and something. The State Board of Health confiscated the whisky and we shipped it back to Los Angeles to the Terminal Warehouse.

(Witness excused.)

CHARLES FERRETTI,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Charles Ferretti, and I live in Sonoma (125) where I have a liquor store and tavern. I operate Charlie's Place. I know Primo Rocco. I have known him three or four months. In connection with McHenry whisky, I first learned of it from Johnson of Boyes Springs, who said he was going to Santa Rosa to see if he could get some whisky, and asked me if I wanted to ride with him. I did and went to Rocco's tavern. Johnson introduced me to Rocco and he talked with him first, but I did not hear that conversation.

Q. Do you recall what you said to Mr. Rocco and what he said to you?

A. When Mr. Johnson was finished he called me over there——

Mr. Cannon: Your Honor, I offer an objection at this time on behalf of all the defendants to this conversation, and to questions that may be asked of this witness along the same line with respect to conversations on the ground it is hearsay and has no value in the case as against any of these defendants. In anticipation of your Honor's ruling I will take an exception to it, and may I have an understanding the objection and exception runs to the entire line of testimony?

(Testimony of Charles Ferretti.)

The Court: Yes. Objection overruled. (126-127) [90]

Rocco asked if I was interested in buying some whisky and I told him I was, and he told me he could get me some of McHenry Blended, which would cost about \$50 a case all told, and he told me to give him \$500 and when the liquor came I would have to pay the balance, whatever the bill was (127). That was for 25 cases. There was no discussion as to the OPA or ceiling price, but he said to give him \$500 and he would get me 25 cases of whisky and then I could pay the balance when it comes COD. Later I received the whisky. A few days later at Boyes Springs I met a man I think was Malaby who wanted me to sign a release on the whisky warehouse receipt, or something. The papers in Government's Exhibit 17 for Identification are the papers I mean; and the signature, Charles Ferretti, on the second and last of those papers, is my signature. Later I received the whisky, paid COD for it, amounting to \$900 plus. I had to pay the freight besides the amount set out in the customer's copy of the invoice.

(Witness excused.)

ENRICO BARROTTI,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Enrico Barrotti, and I operate a tavern in Petaluma, at 41 East Washington Street. During the Spring of last year I purchased, or agreed to purchase, some McHenry whisky. I first talked with Primo Rocco who I met in the Center Club (130). He asked me if I wanted some whisky, and he had a sample. Ira Burnett was also there (131).

Q. What did Rocco say when he introduced you to Burnett?

Mr. Cannon: If the Court please——

Mr. Licking: I will stipulate, if the Court please, that the same objection heretofore made by counsel is interposed to this and the Court has made the same ruling. [91]

Mr. Cannon: It is hearsay as to these defendants and we will take an exception to the ruling, and the understanding is that we have a running objection and running exception to the testimony.

The Court: Let the record so show. (132)
(Witness continuing:)

Both Rocco and Burnett said they could get whisky, but I do not know who had the sample. The price was discussed of \$57 a case. Rocco said that he had a carload come and he would like to sell about 100 cases more or less. I contracted for

(Testimony of Enrico Barrotti.)

200 cases at \$57 a case and paid down \$4220 to Rocco; and he gave me a receipt for it, which is Government's Exhibit 16-A for Identification. It reads, "May 17, 1944. Received from Enrico Barrotti \$4120. P. L. Rocco." (134) I signed Government's Exhibit 16 for Identification before I got the whisky. I signed them at my place, when Rocco and Burnett were there, and Malaby who signed under the printing, "International Import Company." Later they brought 50 cases and wanted \$30 more so I refused to accept it. They had already unloaded the whisky but when I refused to take it they loaded it up again and drove off.

(Witness excused.)

MARTIN FUCHSLIN,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Martin Fuchslin, and I am a hotel and tavern keeper at 338 Third Street, in San Francisco. Early last year I purchased or agreed to purchase some McHenry whisky. I do not know the man I first met, but I saw him out in the hallway with an overcoat on, but I do not see him in court. I met him in a tavern on Kearny Street.

(Witness withdrawn.) [92]

FRANK SPENGER,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Frank Spenger, and my place of business is 1919 Fourth Street, Berkeley. Early last year I entered into an agreement to purchase some McHenry whisky, and first contacted Mr. Malaby whom I had met a couple of times in my place of business. Mr. Benson introduced him to me. About that time almost every one was short of whisky. I believe this was in April. I signed some papers at the time of making the deal. When Benson came to my place with Malaby, Benson stayed outside, while Malaby and I talked in the office. It was about a week or ten days after that that I signed the papers (143).

Q. About a week, you say, before you signed the first of the papers you after signed in the transaction; what was your conversation?

Mr. Cannon: If your Honor please, I object on behalf of all the defendants except Mr. Malaby. I make the objection jointly and severally, and anticipating your Honor's ruling I would like to take an exception to an adverse ruling. I object on the ground it is hearsay as to the other defendants. If it is agreeable with your Honor I would like to have the objection running throughout the conversation as between this witness and any other person out of the presence of any of these defendants. I take an exception to the ruling.

(Testimony of Frank Spenger.)

The Court: The objection will be overruled. I think I have indicated clearly, I attempted to, that unless it is connected up it will go out.

Mr. Cannon: I understand that. I am afraid, though, if we ever have to go to a circuit court that the circuit court may not understand the force of my objection. [93]

The Court: I think under the new rules even an exception need not be taken. (144)

(Witness continuing:)

Malaby had a sample with him and it tasted good, and he said that that was the whisky that he proposed to sell me. He said it was McHenry Blended, and the price was \$60 for the blend and \$70 for the bonded. He did not extend me credit for the whisky. There was an overage of so much a case. I think the OPA price was around \$26 or \$27 for the blend and \$30 some odd for the bond. I ordered 500 cases, and at that time signed a yellow order sheet, shown as Government's Exhibit No. 4 for Identification. The second of these papers bears my signature and is a receipt for money or merchandise to be delivered; and the third, which is a delivery receipt, dated May 23rd, also bears my signature. Between our first conversation and later, he came over several times. The certified check debit for \$1809.50 is for 50 cases which were delivered (147). We discussed how the over-the-ceiling price was to be paid, and we decided we were to go to San Francisco and put that in escrow for 90

(Testimony of Frank Spenger.)

days until we got our whisky. I went over to San Francisco with Malaby and Benson, about a week after our first conversation. In San Francisco we went to Files' office. Files was there but Benson did not go in. Shaeffer walked in, after the deal was over. Government's Exhibit 4-A for Identification shows my check that I drew then and which I handed over to Files. He filled it out and I signed it. Malaby and I had figured out the amount the check was to be and Malaby gave Files the directions. There was no discussion at all in Files' office as to the transaction that Malaby and I had made. Since the deal being made was illegal we had been talking about what I would show I was paying this money for, and it was suggested that I was making a deposit on an apartment house or it was to [94] look like that. I had had my conversation already with Malaby and we just put the money up there in Files' office as security to pay for my liquor. There was very little said to Files. Files did not talk much about it. It was all right; the thing was all right; and I did not have to worry about that. Exhibit 4-A is the receipt Files gave me for the check (152). The check was cashed on April 26, 1944. Later I received 50 cases of Blend whisky and started to use it in my place but got so many kicks on it that I stopped serving it. I tried it myself and it did not compare favorably with the sample that I had tried. The Pure Food came along and condemned it all and I left it in my warehouse, but later they came and took

(Testimony of Frank Spenger.)

it away to some express company. It was sent back to the firm from whom we got it.

Mr. Ames: Has your Honor ruled on the objection of Mr. Cannon that this is all immaterial? I would like to have your Honor's ruling. The objection to all this testimony with reference to what became of the whisky afterward; it is quite immaterial and serves to prove no facts alleged in the indictment. The objection is in behalf of all the defendants.

Mr. Licking: I am attempting to prove, your Honor, the whisky went back to the International Import Company, where it came from. That is all.

The Court: For that purpose I will allow it; for that limited purpose. Proceed.

The Witness: It went back to the National Import Company. (155)

Cross Examination

By Mr. Cannon:

I knew from the very first time I worked out these negotiations with Malaby that I was violating the law, and all the way through I intended to violate the law, and gave my check for that purpose.

Cross Examination

By Mr. Ames:

On the original order which I gave there were 200 cases of blend, 200 cases of whisky, straight bourbon and a hundred cases of rye. The last two are bonded. Malaby said he was able to deliver

(Testimony of Frank Spenger.)

them and that he would give me all of the whisky I wanted.

Cross Examination

By Mr. McDonald:

I met Malaby and Benson in my place of business in Berkeley and had a conversation with Malaby in regard to the purchase of whisky (156) and the price was then agreed upon. I knew the amount of money I was to deposit and agreed to all of that in Berkeley. I came over to San Francisco about April 24 and took my check there, and went to Files' office where the check for \$13,736 was made out and I signed it, and received a receipt for it. Very little, if any, discussion was held in Files' office.

Cross Examination

By Mr. McGuire:

I never did see or have any transactions with Lowenthal. I do not even know him.

Redirect Examination

By Mr. Licking:

Malaby came to my place eight or nine times altogether. The day the order was written up he had Mr. Newman with him. When Newman was there, there was no discussion about any overage. That had already been discussed with Mr. Malaby. When Malaby introduced Newman to me he said that Newman was his associate. I believe Newman came to my home one night, a day or two before

(Testimony of Frank Spenger.)

we made the transaction, but at that time there was no discussion of any deal or overage payment.

Recross Examination

By Mr. Cannon:

I believe Malaby introduced me to Newman as being his brother-in-law, but he said that Newman was his associate. The \$1809.50 paid by certified check was figured on the basis of [96] the ceiling price of the whisky. The only discussion that was had with Newman was concerning the ceiling price and not about any overage.

Further Redirect Examination

By Mr. Licking:

In Mr. Files' office I just turned the check over to him and there was very little—practically nothing—said about it. But in that office I brought up the subject myself and said, “What can I say this money is for, for my books?” And I said, “Couldn't you put it down as a deposit on an apartment house, or something? I cannot put it down on my books as overage for whisky.” It was after that statement that Files gave me the receipt, shown as Government's Exhibit 4-A.

Further Cross Examination

By Mr. McDonald:

That discussion was with Malaby and Files. It was my intention that I would receive this whisky within 90 days. I had no discussion about the transaction with Shaeffer at all. Shaeffer came

(Testimony of Frank Spenger.)

in the office after it was settled and after I had received the receipt, and was introduced to me then, but he was not identified with the transaction.

(Witness excused.)

MARTIN FUCHSLIN,

a witness previously called for the Government,
testified:

Direct Examination

By Mr. Licking:

I have identified John McKinnon. About two weeks after I met him I turned over some money in escrow, but I had not signed up any papers before I put that money in escrow. I got a receipt for that money but Newman tore it up.

Q. Is Mr. Newman here? A. Yes.

Q. Point him out.

A. That is the gentleman over there.

Mr. Cannon: Stand up, Mr. Newman. Is that the man?

The Witness: No; the other fellow next to him.

Mr. Cannon: Next man to him. The record will show that [97] Mr. Newman stood up and he is not the man.

Mr. Licking: Well, walk down and point out the man that tore up the receipt.

The Witness: The heavy fellow, there.

Mr. Licking: Who tore up the receipt. Let the

(Testimony of Martin Fuchslin.)

record show the witness has identified Mr. Shaeffer as the one who tore up the receipt. (165)

(Witness continuing:)

Government's Exhibit 2 for Identification, the green order blank, dated May 9, bears my signature. The check I drew for the whisky was on May 24. About a month before that I talked with McKinnon in the William Tell Hotel on Kearny Street.

Q. What was your conversation with Mr. McKinnon? (167) * * *

Mr. Cannon: It is hearsay as to these defendants; it does not prove or tend to prove any issue.

Mr. Licking: That is the same objection you have to all the similar testimony that has been introduced.

Mr. Cannon: Yes.

The Court: Overruled.

Mr. Cannon: Exception. May I have a running objection?

The Court: Unless it is connected up it will go out. (168)

(Witness continuing:)

We were talking about the whisky shortage and he said he knew where we could get some at about \$57 a case including everything.

Q. * * * * Was there any discussion at that time about the ceiling price or OPA price?

A. Well, I knew it was over the ceiling price.

Q. You knew it was over the ceiling price?

A. Yes.

(Testimony of Martin Fuchslin.)

Mr. Cannon: I move to strike it out as immaterial.

Mr. Licking: If he knew it merely of his own knowledge,—if [98] he knew if from the conversation.

Mr. Cannon: I move it be stricken out.

The Court: What is your objection?

Mr. Cannon: It is a conclusion of the witness that he knew it was over ceiling. No conversation to that effect.

The Court: He, as an individual, knew it.

Mr. Cannon: But his knowledge wouldn't be binding upon the defendants.

Mr. Licking: Well, I respectfully suggest, if your Honor please, that each one of these purchasers, himself, became pro tanto a member of the same conspiracy, if I can prove a conspiracy for this purpose existed.

Mr. Cannon: You mean each one of these purchasers of whisky became a party to the conspiracy?

Mr. Licking: Everything they did in carrying out this particular conspiracy, certainly. You can't sell it without a purchaser, and you can't offer it for sale unless you have a purchaser.

Mr. Cannon: I think I have made my objection clear to the court. I will take a ruling.

The Court: Objection overruled.

Mr. Cannon: Exception. (169-170).

(Witness continuing:)

(Testimony of Martin Fuchslin.)

McKinnon said, "You pay so much down, over a thousand dollars in escrow and the rest when you get the money" (whisky). There was no discussion at that time as to whether or not the rest was the ceiling or OPA price. I met Mr. Files in the real estate office on Kearny Street. I went there myself and McKinnon waited for me on the corner. He had told me to ask for Files, who made out the receipt; and there was another fellow in the back but I did not pay much attention to him. Files' name was on the receipt. I gave him \$1200, as I recall. [99] I had not signed anything up to that time. I had ordered 50 cases of McHenry whisky from McKinnon. The money I deposited, over \$1000, was in cash (173). After that I did not meet any one until I paid the \$1800, at which time I must have signed some documents. I signed these papers, Government's Exhibit 2 for Identification, when I paid over the check for \$1800, and at that time the man that I identified as Shaeffer tore up the receipts. That was at my bar in my place.

Cross Examination

By Mr. McDonald:

I can identify the gentleman I met on Kearny Street if I can see him.

Cross Examination

By Mr. McGuire:

I do not think I have ever seen Lowenthal before (174).

(Testimony of Martin Fuchslin.)

Cross Examination

By Mr. Gillen:

My place of business is at 338 Third Street, San Francisco.

Q. What was the date you said you met Mr. Malaby?

A. I couldn't tell you the date, that is so damn long ago.

Q. Well, you had given a check for \$1800 on that date? A. Yes.

Q. To whom did you give the check?

A. The check to the fellow next to him.

Q. You gave the check to the fellow next to me?

A. That fellow over there. That's him, that fellow next to Malaby.

Q. Where is Mr. Malaby?

A. Right there, in back of you.

Q. Go down and point to Mr. Malaby.

A. Right here.

Q. This man, here?

The Court: Go down there.

Mr. Gillen: This man, here?

The Witness: This man, here, and he took the check.

Mr. Gillen: This man took the check?

The Witness: This gentleman took the check.

Mr. Gillen: This is Mr. Malaby. [100]

The Court: Just a moment. Let's get this record straight. He is pointing to whom?

Mr. Gillen: I was going to identify him in a moment, your Honor. 175) * * *

(Testimony of Martin Fuchslin.)

Mr. Gillen: Is this the man you recognize as Mr. Malaby?

A. That is the man I know was talking.

Mr. Gillen: Let the record show he points to the defendant Files.

Q. Did he introduce himself as Mr. Malaby?

A. He did not, but I seen a picture of him.

Q. Who showed you the picture of Mr. Malaby?

A. Well, I seen it out here in the place.

Q. Mr. Licking showed you the picture; isn't that correct? The United States Attorney, here, he showed you the picture of Mr. Malaby? I see. That is what you assumed, it was Mr. Malaby, the man at the end.

The Court: Just a moment. Let him step forward. Identify him.

Mr. Gillen: The man at the end. Do you think that is Mr. Malaby?

A. No. I guess I made a mistake.

Q. You think you made a mistake. Do you know who that man is? A. Yes.

The Court: Point to him. (176) * * *

The Court: Gentlemen, I want this record clear.

Mr. Gillen: I am going to do that, but I would like to have the opportunity of testing this man's ability to identify people before I indicate who he is pointing to. The record will show he pointed to him—that is, the witness pointed to Mr. Lowenthal first, identifying him as Mr. Malaby, and now saying that he may have been mistaken about that.

(Testimony of Martin Fuchslin.)

Q. Do you know who this man is, whom I am pointing to——

A. I seen him before, but I don't know him by name. [101]

Mr. Gillen: Let the record show we are still indicating Mr. Lowenthal. (177) * * *

Q. How many times did you meet this man I am pointing to now, and I will identify the man in a moment for the record. How many times did you meet him? A. I guess I met him once or twice when I gave him the check.

Q. You met him once in your place of business on Third Street when you gave him the check?

A. Yes.

Q. Why did you say that he was Mr. Newman—and I am indicating the defendant Shaeffer?

A. Well, you get mixed up in names, but I never forget faces. (178) * * *

Mr. Gillen: * * * Mr. Newman was asked to stand up. He could not identify him, but he did identify Mr. Shaeffer as the man who came along with Mr. Malaby.

Mr. Cannon: That's right. (179) * * *

Q. What gave you the impression that the man that Mr. Malaby brought to your place of business was Mr. Newman? A. I don't know. (179)

(Witness withdrawn.)

VICTOR FIGONE,

a witness for the government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

I am in business at 455 San Pablo Avenue, El Cerrito. (184) I have a saloon business and restaurant. I had a business transaction on McHenry whisky in the early part of last year and first contacted Malaby and Newman. Malaby came to my saloon and I bought some whisky, or ordered some, from him. I met Malaby first. Malaby said he had liquor from the International Import and I gave him an order for 50 cases. Government's Exhibit 5 for Identification is a receipt for money for merchandise to be delivered, and I signed it then. Newman and Malaby were together. I made the check out and handed it to Malaby. I got [102] a receipt for the order. The document shows the payment of \$1809.50 for 50 cases of McHenry Reserve whisky at \$30.07 a case. (186) The next morning they were back, both Malaby and Newman, and I gave them the balance in currency. Malaby told me the whisky would be \$60 a case altogether. I gave him the balance of around \$1100 in cash. There was a discussion between Malaby and me about the OPA price. He said that price of the OPA was \$30 and something. Malaby had walked into my place first, and then Newman came in, and he was sitting there while we were discussing the matter of the OPA price

(Testimony of Victor Figone.)

and the overage payments. I was about two or three feet away. The next day I paid the overage in cash because they wanted it in cash. Malaby told me that he would want that in currency, the balance; but I got no receipt for it. Newman was there when the money was paid over, but I do not recollect that he was looking on because I was busy.

Cross Examination

By Mr. McGuire:

I never saw, nor did I have any conversation with Lowenthal in connection with the transaction.

(Witness excused)

GUY CAPUTA,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

I am a tavern owner, at 1637 Broadway, Oakland, and have been in business since 1936. The early part of last year I agreed to buy some McHenry whisky. This was in February. Malaby came alone, the first time, and I had a conversation with him; and later, I paid over some money to him after he had told me the price. After I had first talked with Malaby it was two weeks before he came again, and I got a receipt for the money that I put up. Government's Exhibit 6-A for Identification is a copy of that receipt. I gave Mr. Files the money on

(Testimony of Guy Caputa.)

March 27. No one was present when I was first talking [103] with Malaby.

Q. What did he say and what did you say?

Mr. Cannon: At this time I object on the ground it is hearsay as far as all the other defendants are concerned, and I object to the testimony on that ground.

The Court: Overruled.

Mr. Cannon: Exception, and I reserve a motion to strike at a later period in the event it is not connected up.

The Court: Very well

Mr. Cannon: Exception to your Honor's ruling.
(190-191) (Witness continuing:)

Malaby said he wanted to sell some whisky and he gave me a sample, which tasted good. He said it was McHenry's, and showed me a label, and told me first the price would be \$31.20; and \$6.20 for tax. After I gave him the money he came back again and raised it. This was one week later, and he came alone. I told him I wanted my money back because I did not like the deal. I agreed to buy 500 cases, and I signed a receipt for an order. The first time that I talked with Malaby he told me that I would have to pay the ceiling price of \$36 plus more. At the time I paid him the money I got Government's Exhibit 6-A for Identification which is a receipt stating, "Received of Guy Caputa \$12,350 as a deposit on an investment." (194) When I signed this I had already put the money, \$12,000, down,

(Testimony of Guy Caputa.)

and signed this receipt for 500 cases of McHenry's Reserve but I had already begun to want my money back by the time I signed this, which shows that the price was to be \$18,200 with the notation, "No cash down." (195) I got this receipt when I gave the money to Mr. Files on Kearny Street. I went to Files' office alone. Malaby told me to go there and deposit the money down (198). Before that time I had not seen Newman. I saw him in the office of Files. I got this receipt on March 27. [104] Files was in the office and so was Newman, and so was Malaby. At that time I had no discussions but just paid over the money. Malaby said, "Files is a nice man and he guaranteed the money." I turned over \$12,000 to Files. He didn't say a word. He gave me a receipt. I paid the money after Malaby told me to pay it in check or cash, that either was all right, but just to give it to Files (201). I deposited \$12,360 and got a receipt for it and afterwards I signed Government's Exhibit 6 for Identification for 500 cases of McHenry blended whisky. It was to cost \$58 a case. When I received the whisky I was to pay Mr. Files according to the talk that I had with Malaby. When I paid the money to Files, Malaby and Newman were there. There was no discussion in the office when I paid that money. Malaby told me to pay it and he told me to pay the balance when the whisky was delivered. Newman visited my place of business again after that, with Malaby. At that time I wanted my money back and talked it over with Newman and Malaby, and they said that

(Testimony of Guy Caputa.)

the next month they would give me \$5,000; and they did, in two instalments of \$2,500 each; that is, Files paid me back this \$5,000, I think in September or October of last year.

(Witness excused.)

ROBERT C. THOMASON,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My place of business is at 309 San Pablo Avenue, El Cerrito, and I run a bar there. I purchased, or agreed to purchase a certain amount of McHenry whisky early last year through Mr. Lowenthal, who is in the courtroom. I met him in a bar in San Francisco and he told me he thought there was a man who could fix me up on whisky. I met Lowenthal again the next day, and he took me down to see Malaby (206) and at that time I signed [105] certain papers that embrace Government's Exhibit 7 for Identification; rather, my ex-wife executed them. I was out of town, the bill was brought to the house, and she gave him a check for it, when the whisky was delivered. When I first saw Lowenthal and talked with him about it, it was so long a time before the whisky was delivered that I thought it would not be delivered. It was four or five months after I talked with Malaby that I got the liquor.

(Testimony of Robert C. Thomason.)

Malaby gave me a receipt the day I gave him the money, and I gave the receipt to Mr. Bird. It was dated April 4 and is shown here as Government's Exhibit 7-A for Identification.

Mr. Cannon: If your Honor please, at this time counsel and I have agreed upon the following stipulation, and that is, on all of the conversations that are being elicited from any witness which conversations are out of the presence of certain of the defendants, it will be deemed for the purpose of the record that those defendants were absent when the conversation was held, and I object to the testimony on the ground that it is hearsay and reserve a motion to strike it in the event at a later time it is not connected up.

Mr. Licking: I am perfectly willing if the Court is that that objection may be deemed taken to all conversations which I am eliciting.

The Court: Very well. (208)

(Witness continuing)

Lowenthal asked me how much liquor I could use, and I told him 100 cases. He gave me a price, I think around \$57.50 a case, but there was no discussion then as to how it was to be paid. I was to meet him the next day, which I did, and he took me to see Malaby at the office of W. O. Files on Kearny Street. I do not know whether Files was there. I was not introduced to him. There was another man there and a [106] couple of ladies, as near as I can remember, but I do not remember the man's name.

(Testimony of Robert C. Thomason.)

Lowenthal and Malaby had a conversation, on April 4. Malaby asked me how many cases I would take and I told him, 100, and he said, "That is cash," and he said he would have to have some money down to start with, and I was to pay the rest of it when the shipment was delivered, at the invoice price (209), which price on the invoice was to be the OPA price; and I was to pay the difference between their price, \$57.50, in cash, which I did by giving the money to Malaby who then gave me a receipt. This was done in the presence of Lowenthal.

Cross Examination

By Mr. McGuire:

I first met Lowenthal through an introduction by the bartender in the bar at Golden Gate and Turk, in San Francisco. Lowenthal told me to meet him the next day at the same place and we would go down to see Malaby. I did that. Malaby, and Lowenthal, and I all went in the back office of Mr. Files' office. We all went back to the counter. Malaby gave me Government's Exhibit 7-A when I gave him the money. I did not give Lowenthal any money. All negotiations leading up to the closing of the deal were between Malaby and myself. Lowenthal merely introduced me.

Redirect Examination

By Mr. Licking:

Before Lowenthal introduced me to Malaby, the price had already been discussed, and all other discussions between me and Malaby were in the pres-

(Testimony of Robert C. Thomason.)

ence of Lowenthal and within his hearing; and Lowenthal took part in the conversation with Malaby. I do not remember exactly in what way.

(Witness excused.)

MARGARET McNEIL,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking: [107]

I am in business at 740 San Pablo Avenue, El Cerrito, at the Big Boy Barbecue, and have a restaurant and bar there. Early last year I purchased or agreed to purchase some McHenry whisky, and to that end first contacted a fellow by the name of Newkirk (213) whom I had met at the service station where he was an attendant. About two weeks later I gave a check which was payable to the International Import Company, and which check was taken to the bank and certified, and I got a debit slip for it. When I first talked with Newkirk about it, he did not seem to know an awful lot about it. He said he would have to make a telephone call and get hold of the party. The next person I met was Lowenthal, who is here in court. I had never met him before he came to my house with Newkirk. My husband and a friend of ours were there. Lowenthal had some samples of McHenry Blended Whisky. I sampled it by pouring it in a saucer and

(Testimony of Margaret McNeil.)

saw that it would burn. I do not remember the exact conversation, but I told him we were short of whisky and wanted some. He said he would give it to us within 21 days at \$64, of which \$5344 was to be in cash, which I handed over to Lowenthal. I ordered 200 cases. The balance for the whisky was to be paid in cash when the whisky was delivered. No discussion was had as to the OPA ceiling price. Subsequently 50 cases were delivered. Delivery receipt attached to Government's Exhibit 7-A, showing the delivery of 50 cases of McHenry Reserve at \$30.70 per case, plus \$6.12 floor tax, totaling \$1809.50, which I paid out before the whisky was delivered, in addition to the \$5000 plus that I have spoken of. After meeting Lowenthal I met Malaby. When I paid Lowenthal \$5000 he gave me an order blank which had already been signed by Malaby. Later Malaby came to my place of business, with some lady. He asked if I had given Lowenthal an order and if he had gotten any money, stating that none had been turned over to him. He [108] said he had heard that Lowenthal had gotten an order from me, and I showed Malaby the order blank for 50 cases and the receipt for \$5344 (220) given to me by Lowenthal; and I told him I had given Lowenthal that money. Next I saw Newman, in about three or four days, at my place of business. He was with Malaby. They wanted to know if I gave Lowenthal an order; and I told them I had, and they asked how much money I had paid, and I

(Testimony of Margaret McNeil.)

told them how much, and they wanted to know if I had any witnesses to that effect, and I told them I did; and they said they would have to make the order good; but they had not as yet received the money from Lowenthal. Later I made a long distance telephone call to Los Angeles to get my money back. I do not know whether that was before or after Newman had come to my place. On that call I talked with Newman. I remember it was after I had first met Newman. I never at any time in the course of this business became familiar with the name of the International Import Company. (222) When Newman and Malaby were there I showed them the receipt that Lowenthal had given me, and I retained that receipt until later. Lowenthal called several times and we were trying to get the money straightened out, and I made an appointment for him to bring the money over to me, but he did not do it. I talked to Newman later, and he came to my home one night around 11:30 with Malaby. It seems that they had not yet gotten the money from Lowenthal. It did not seem like I was going to get anything, and I asked for my money back, and I told Lowenthal I wanted to call the deal off. I also told Newman and Malaby that. I got 50 cases of whisky, at the invoice charge, weeks after my talk with Newman and Malaby about the money. Since I received part of the liquor I have not talked to Malaby or Newman. I do not know where the \$5344 went except that I gave it to Lowenthal. I gave

(Testimony of Margaret McNeil.)

the receipt [109] that I had had from Lowenthal to Newman and Malaby the day that I gave them the check for the whisky. They told me they had not received the money I had given to Lowenthal. I could not get my money back from Lowenthal, so I was willing to let the deal go through, if I got the whisky that I had ordered.

Cross Examination

By Mr. McGuire:

I first met Lowenthal through Newkirk; and Lowenthal gave me an order that had previously been signed by Malaby, that called for 200 cases. I did not sign the order. This was on Sunday, when I gave him \$1200 less than \$5344, but he came back on Monday and got the \$1200, saying he was short in his figures and had made a mistake. He gave me a receipt for \$5344, yet up to that time he had only received \$4000; but he got the balance to make up the \$5344, the next day. Lowenthal did not tell me that they were not making deliveries of whisky and did not ask me if I wanted my money back. No such conversation took place. I saw Mr. Lowenthal later, at my place, my brother-in-law was there, but not Malaby or Newman. The conversation was concerning the return of my money. He said he had loaned \$2500 of my money to his brother, and he had gone south and he did not have the money. He also said he had \$2500 in a safe deposit box, but he did not tell me that he had given

(Testimony of Margaret McNeil.)

it to Malaby or Newman. I never did tell Malaby or Lowenthal that I was completely satisfied with the deal. (230) I never asked Lowenthal if he would sell some liquor for me. I did not give Lowenthal a list of liquor that I wanted him to sell. I have never seen the paper which has been marked Defendants' Exhibit B for Identification before this time.

Redirect Examination

By Mr. Licking:

I do not remember signing any new order or anything, but the paper you show me bears my signature, although I do not [110] remember signing it.

(At this point U. S. Exhibit 8-A for Identification was marked.)

Recross Examination

By McGuire:

When Lowenthal came to my place of business on Sunday, he gave me a receipt. I think there were three of them together. I kept two and I think Lowenthal kept one, but Newman and Malaby picked them up.

(Witness excused.)

MARTIN FUCHSLIN,

a witness for the Government, was recalled, and testified:

Direct Examination

By Mr. Licking:

The person I first talked with about this whisky was John McKinnon (233). I got a receipt for the extra money that I paid and that receipt was given to someone and destroyed when the whisky was delivered, when I paid the balance. Since I testified this morning I have met one of the men who was there at the time. The two men that were there were Newman and Malaby. I paid them before I got the liquor, and at that time I turned the receipt that had been given to me, over to them. I delivered the receipt to Newman.

Cross Examination

By Mr. Cannon:

Since this morning I have not talked to anybody about Mr. Newman being the one to whom I gave the receipt and by whom it was destroyed. Since I left the witness stand this morning no one has talked to me about Newman being the person by whom the receipt was destroyed. I was confused about Shaeffer and Newman this morning, but now I know it was Newman. This morning I did not know which was Newman and which was Shaeffer.

Redirect Examination

By Mr. Licking:

When the money was paid over I paid it in Files'

(Testimony of Martin Fuchslin.)

office [111] and while I am not positive, I think it was paid to Mr. Files. I could not tell whether Shaeffer was there or not, at that time.

(Witness excused)

ELLIOT R. SMITH,

a witness for the Government, being duly sworn, testified;

Direct Examination

By Mr. Licking:

I am a restaurant and saloon owner at 1782 West Seventh Street, Oakland, and during the forepart of last year I had a partner named J. H. Gibson, who is now in Texas in the armed service. Early in 1944 I had a deal on some McHenry whisky and first contacted Lowenthal. The whisky was later delivered to me, and I received an invoice on it which is Government's Exhibit 18 for Identification. The invoice is dated in May, and that is the time I received the liquor. The invoice is signed by my partner. About 10 weeks prior to May 24, the date of Government's Exhibit 18 for Identification, I had my first conversation. Lowenthal came to my place and introduced himself and said he was a liquor salesman. He was with a man named Navinger (242). Lowenthal did not have a sample of the whisky but he had the label and it looked all right. The price was to be \$65, to the best of my knowledge, for a case of fifths. I ordered 50 cases. At

(Testimony of Elliot R. Smith.)

that time I knew there was a ceiling price on liquor. The understanding was that there would be a differential to pay to Lowenthal over the regular price, which was to be paid before delivery, and which differential was to be paid in cash. At one time Lowenthal was there with Malaby. The last time I saw Lowenthal Newman was there, and I gave a certified check to Newman before the whisky was delivered. It was for the invoice on the liquor, as shown in Government's Exhibit 18 for Identification. That is the first time I saw Newman, and it is the only time I ever saw him. The overage was collected by Malaby and someone else [112]. Malaby and Lowenthal got the overage while Navinger was there. (245). The card which you show me is the one that Navinger and Lowenthal presented and has in figures \$1480.50, which represents what we paid over the nominal price of the whisky. The first conversation was on April 8, 1944, or very close to that date. We paid the overage very shortly after Lowenthal was there, but I cannot tell you the number of days. Malaby and Lowenthal were there, but I do not believe Newman was. The only time Newman was there was when I paid the invoice price by certified check.

Cross Examination

By Mr. Cannon:

The certified check that I gave to Newman is shown as Government's Exhibit 18 for Identification.

(Testimony of Elliot R. Smith.)

Cross Examination

By Mr. McQuire:

Every time that I have mentioned that Lowenthal was present on these conversations he was there, I am reasonably certain. When Lowenthal was first there he showed me brands of several kinds of liquor, and told me the price was \$65 a case of fifths. I do not believe I signed anything then. Later Lowenthal came back with Malaby (251). I do not know who I paid the money for the overage to. It was to either Malaby or Lowenthal. They were both there at the time. I do not know who picked it up.

(Witness excused.)

JACK CARDINELLI,

a witness for the Government, being duly sworn, testified:

My name is Jack Cardinelli, and I live in Pittsburgh. In the early part of last year I purchased or agreed to purchase a quantity of McHenry whisky. I believe it was around March. I first contacted Malaby at Richmond. I was introduced to him by a man in the tavern, and I had a conversation with Malaby, who told me he had whisky and he gave me a price, including [113] the overage, which was the difference between the OPA and \$61.50. There was a discussion that the price to be paid was to

(Testimony of Jack Cardinelli.)

be over and above the ceiling price, or OPA price, and this overage was to be paid before delivery of the whisky. I placed no order then but later met him at the Sutter Hotel in San Francisco, within two or three days. He had given me his phone and I called and made an appointment with him. At that time I discussed buying 225 cases and the difference between the OPA ceiling price and the asked price was approximately \$6000, which Malaby said must be paid in cash. I paid it to Malaby in cash at the Sutter Hotel, at that time. I was at that time given just an ordinary statement invoice of the account for 225 cases of McHenry which had the OPA price on it. I saw Malaby on and off after that. I later saw him at the Palace Hotel while Newman and Cain were with him. They were in the same room at the Palace with me. I got a call from Malaby telling me that they had the whisky, that it had arrived in Los Angeles, and for me to come up and get an invoice and that they were going to ship 25 cases, or something like that, to me. I went to the Palace to get the invoice and went to Malaby's room. He took me up. That was when I first met Newman and Cain. It was a room with two beds in it—twin beds—and had a small stand on one end with a typewriter on it. Newman was making out invoices on the typewriter, and I got an invoice that day. I was introduced to Cain. Newman was getting his information from Malaby to make out the invoices. Cain was lying on the bed, to the right of the typewriter, about eight feet away. I

(Testimony of Jack Cardinelli.)

was standing about even with the bed. I overheard a conversation between Malaby and Newman then, and Cain was on the bed as I have described, as far as I remember. It was only a few minutes since I had been introduced to him. Newman asked Malaby, as Newman was making out the invoices, [114] "How about the overage?" referring to my transaction, and Malaby says, "Yes, I have got it." (259) That conversation was in the presence of the three defendants.

Mr. Licking: If your Honor please, I will offer this evidence of this conversation against the defendant Cain and the defendants Newman and Malaby.

Mr. Ames: Malaby?

Mr. Licking: Malaby is not on trial or I would naturally offer it against him. (259-260).

Cross Examination

By Mr. Ames:

My place of business in Pt. San Pablo, but I live in Pittsburg. I have no tavern. I am in the fish reduction business (260) and not in the liquor business. I was buying this liquor for a fraternal organization—the Elks, at Pittsburg. I have nothing to do with the management of the Elks at Pittsburg, and do not run the bar. Malaby is the first man I saw about liquor, in March or April, as I remember, 1944. I never received any of the liquor, so there was never any invoice. I got the order blank I told you about. I do not know what has become

(Testimony of Jack Cardinelli.)

of it, although I suppose it was given to me. I looked for it and I do not know where it is. I turned it over to the Elks. It was not signed by anybody. Malaby wrote it up. Some time in May I came to San Francisco and went to the Palace Hotel where Malaby was. I talked very little to Cain. I said, "How do you do" when I was introduced.

Q. As a matter of fact, you did not have any conversation with him at all, isn't that true?

A. Well, that depends.

Q. I mean except friendly greetings.

A. Something like that.

Q. You did not talk to him about any liquor?

A. No, that is right. [115]

Q. You never got any liquor?

A. That is right. [262)

(Witness excused.)

JOHN P. KUSALO,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is John P. Kusalo, and I live at 10701 East Fourteenth Street, San Leandro, and I run a tavern and a restaurant in Oakland. Early last year I made a deal to buy some McHenry whisky and was first contacted by a man who runs the bar for Pete de Georgis. This was in April. De

(Testimony of John P. Kusalo.)

Georgis and I and Fred Christenson, the bartender, were there.

Mr. Cannon: Object to this as hearsay. It certainly does not identify the defendants.

Mr. Licking: It is the same situation. We will connect it up, Counsel. The conversation was had with Pete de Georgis and I intend to prove it is a part of the same conspiracy, dealing in the same liquor. (264)

The Court: Well, subject to a motion to strike, I will overrule the objection. (265)

(Witness continuing:)

De Georgis asked me how many cases I wanted and I told him 25, and he wanted to know if I would pay cash for it, and I told him I did not have the cash, but that I would give him a check. Then he said to make one check for International Import for \$868.56 and another check for \$691.44. The amount of the two checks was the total price for the 25 cases of McHenry blended whisky. I did not get a sample. The two checks are Government's Exhibit 20-A and 20-B, and I gave those checks to Pete de Georgis and they were afterwards cashed and went through my bank account. About three weeks later I got the whisky, and when the driver brought it I signed a receipt for it. I [116] paid the express, \$8. My signature does not appear on Government's Exhibit 20, nor on the second of those sheets. I do not recall anyone else in the transaction except de Georgis and the expressman who delivered the whisky.

(Testimony of John P. Kusalo.)

Cross Examination

By Mr. Cannon:

Government's Exhibit 20-B for Identification shows the name of John Kusalo by Christenson. Christenson is the bartender for Pete de Georgis. He was there when I gave the money to de Georgis.

(Witness excused.)

PETE de GEORGIS,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Pete de Georgis, and I am the Manager of the Miami Inn, 1614 San Pablo Avenue, El Cerrito, California. Of the defendants on trial I know Charles Malaby and I have seen Nathan Newman. The early part of last year I recall a transaction I had where I purchased some whisky. I first contacted Malaby, in April, February, or March. He came to my place of business and introduced himself. Malaby and I were there alone. Malaby talked about some liquor at that time. I did not have any and was interested in getting some, and asked him what kind it was. At that particular time he was not sure what brand he would have, but he came back a week or so later and told me the brand was McHenry Blended, I believe. When Malaby came back he was alone

(Testimony of Pete de Georgis.)

with me and we discussed the price and the delivery, and Malaby said there would be a ceiling price and an overcharge price, to be paid separately. I was to pay the overage in cash immediately and a check was to be sent to International Import Company for the ceiling price, a little later. At that time I gave him \$2000 cash, currency, and a few weeks later there was an order from the [117] International Import Company for 100 cases sold to one A. Fera, the licensee. The \$2000 cash was paid to Malaby. I met Nathan Newman when they came to the place of business to get the check of the International Import Company. It was a cashier's check for \$3640. When Newman was there there was no discussion about it.

(At this point U. S. Exhibit 9-A for Identification was marked.)

(Witness continuing:)

When I made the cash payment of \$2000 to Malaby no receipt was given for it. I saw Newman again after he came in to pick up the cashier's check. He stopped later with Malaby and told me the car of McHenry was in, and he brought me a check for \$29 which I had paid over the ceiling price. I was connected with another transaction in this same matter. It was with a friend of mine in East Oakland by the name of John Kusalo who was in need of whisky. I also had another connection with another party, Joe Porfido (273). I had a bartender by the name of Fred Christenson

(Testimony of Pete de Georgis.)

who knew Kusalo. I asked Malaby if he had any whisky that they could give to Kusalo, and he told me he had 49 cases left in the car, and he would give him 24 cases of it. So they gave me an order form as to how much it was, the ceiling price, and the above price, and came out to the place the next evening—that is, I discussed it with Malaby and Newman. In my own transactions I dealt with Malaby alone, except for the ceiling price, but in the Kusalo transaction I talked to both Newman and Malaby. Malaby gave me the order blank for Kusalo and picked up that order blank. Exhibit 20-B for Identification are the order blanks to which I refer. Kusalo and Porfido waited that evening until about eight or nine o'clock, but then went back to their place of business, and I said that when they came here I would just give [118] them the money for Kusalo and Porfido. So they left one check for the International Import Company and one check for the overage; that is, Kusalo did. Government's Exhibits 20-A and 20 are those checks to which I refer. I turned the International Import Company check over to both Malaby and Newman. They would not take the check payable to cash, so I cashed it and gave them the cash for it. That is Government's Exhibit 20 for the overage. I am certain that both Newman and Malaby were there when they refused to take the check for the overage.

Porfido does business on Telegraph Avenue and Thirty-second. Before this I did not know him,

(Testimony of Pete de Georgis.)

but knew his brother-in-law, who asked me if I could do him a favor and help get some whisky for him, and he sent Porfido to see me at about this same time (276). I had a conversation with Porfido. I had previously discussed the deal with the brother-in-law and explained to him what the deal was, and Porfido ordered 25 cases, and asked me if I could get him some more. I did not take any money from him at all at that time, but later took up the deal with Malaby and the same procedure was followed as in the Kusalo transaction. Malaby gave me the same two slips to have signed by Porfido, who had to get the money in two separate payments, one for the invoice to the International Import Company, and the other for the overage (278). Porfido came back to my place the next day and left the check for the International Import Company and he did not have enough cash, so I told him to write out a check to me, personally, and I cashed it, and gave him the cash. Government's Exhibit 19-B for Identification, a check dated June 3, 1944, payable to Pete de Georgis, is the check to which I refer, and it is the overage price. I cashed that check personally. I do not remember the exact figures in cash, but there were 49 cases [119] left in the car, all together, so Malaby gave me those 49 cases for these friends of mine. I gave the check payable to International Import Company to Malaby and Newman. I cashed the two checks, the one of Porfido and the one for Kusalo, made payable to cash, for the overage, and turned the cash over to

(Testimony of Pete de Georgis.)

both Newman and Malaby. In other words, my deal was with Malaby alone, but the other two deals were with Malaby and Newman together.

Cross Examination

By Mr. Cannon:

I had never seen Malaby before I gave him the \$2000, but he had been there a few times talking about this whisky deal before I gave it to him. I did not take any receipt for that payment. I did not take a receipt from Malaby or Newman for any of the money that was paid to them in cash.

(Witness excused.)

PETER REALI,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Peter Reali, and I run a restaurant and bar at 412 Fourteenth Street, Oakland, where I have been about twelve years. I recall a transaction sometime in the spring of last year when I purchased or agreed to purchase some McHenry whisky. I had previously had a lot of telephone calls to find out if I was interested in whisky. The first man that contacted me was Malaby, I think. I got two cards, one of which has on it the name of Lowenthal. I do not know much about Lowen-

(Testimony of Peter Reali.)

thal, but I think Malaby was at my place a couple of times alone, and he finally interested me in getting some whisky. It was in April or May. I gave the gentlemen four hundred and some odd dollars and I paid the balance by a certified check, I believe. When I got the receipt I paid the money, a little over \$400, in addition to the price set [120] out on the Customer's Receipt and Invoice. I knew I was paying over the ceiling price for this liquor. The time Malaby came to get the money and give me the papers, some one else was with him.

Q. You don't remember the name Mr. Malaby gave you?

A. At the time he came up there I believe he introduced Mr. Newman. I think that was the name.

Mr. Cannon: I might ask if Mr. Bird also gave him the picture of Mr. Newman.

The Witness: No. He showed me a picture and I said, "Those are the gentlemen."

Mr. Licking: Q. Do you see Mr. Newman here now?

A. Well, it looks like that gentleman over there.

Mr. Cannon: Which one?

A. The one over there.

Mr. Cannon: Mr. Shaeffer you have identified.

The Witness: Well, it looks something like——

Mr. Licking: Dark hair?

A. Yes.

Q. You know there was another person there,

(Testimony of Peter Reali.)

and to your recollection he was introduced as Newman? A. Yes.

Q. You don't recall his face? A. No.

Q. That was the only time you ever saw him?

A. That is all. (285-286)

Cross Examination

By Mr. McGuire:

I believe Malaby came to my place first. Mr. Navinger was with Mr. Lowenthal when Lowenthal came and gave me his card (286), and I think he said, "I am a liquor importing company if you need any liquor." I believe that is all the discussion I had with Lowenthal. I never paid him any money [121] and never participated with him in any documents.

(At this point the two cards and the invoice headed "National Import Company" were admitted as Government's Exhibits 10 and 10-A for Identification.)

(Witness excused.)

WILLIAM P. BRYDEN,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is William Percy Bryden, and I am a tavern owner in El Cerrito. The early part of last

(Testimony of William P. Bryden.)

year I had some dealings on McHenry whisky and first contacted Malaby alone. He came to my place and asked for the proprietor, and wanted to know if I was in the market to buy some whisky. This was about April. I said I was. He named the whisky as McHenry's, but did not quote any price then, and had no sample. About a week later he came back by himself, and said he could produce the whisky shortly, and said the price would be \$62.50 per case, and said that when he was ready to produce the whisky he would come around again and see me (290), and he did about May 1. He was alone, and said the whisky would be there shortly, that he would see me again when he was ready to produce, but made no request then for any money. The next time he came he had another man with him, by the name of Newman. That was May 25, and I agreed to buy 20 cases at \$62.50 a case. I received a receipt for 20 cases of whisky. I made a personal check to International Import Company for \$723.80, and the balance of \$526.20 was paid in cash in the presence of Malaby and Newman (292). I got no receipt for this \$526.20. Government's Exhibit 11, consisting of an invoice for 20 cases of McHenry whisky for \$723 and some odd cents, are the papers which were given to me at the time, when Newman and Malaby [122] were both there. At that time I gave a check payable to the International Import Company, and paid the cash balance.

(Testimony of William P. Bryden.)

Cross Examination

By Mr. Cannon:

When I made these payments I knew it was a violation of law.

(Witness excused.)

NELLO NOMELLINI,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Nello Nomellini and I am the manager of the Bluebird Cafe, owned by Luigi Di Ricco who also owns El Lido, but I only manage the Bluebird. In the early part of last year I purchased or agreed to purchase for Mr. Ricco certain McHenry whisky, and first talked with Malaby about it. He was alone. He came to my place. He said he had some whisky and it was McHenry's and I think straight whisky. When I first talked with Malaby we discussed the price, around \$27, I was to pay, and in addition to that \$26 a case. The order which you show me was signed later. At the first conversation I paid \$1800 and something to Malaby (297); that is, I paid it down at Files' place, where Malaby took me at a later date. I believe Newman was also at Files' office. At Files' office I talked about turning the money over the purchase of whisky, but I don't know with whom I talked, as

(Testimony of Nello Nomellini.)

the main guy I know is Malaby, and the one I made the deal with; but Files and Newman were there where they could hear the conversation. I got a receipt for my money, but I did not keep it. Government's Exhibit 12-A and 12-B show whisky for El Lido and the Bluebird, and I paid a deposit for both. These papers were brought to my place by Newman and Malaby. When I got the receipt at Files' office I do not know who signed it, but the three of them were there at the [123] time, and later when the invoices for the whisky were made out I gave the receipts back to Mr. Newman. Newman and Malaby brought the invoices and receipts to me.

Cross Examination

By Mr. Cannon:

I think when I made this deal I may have known that I was violating the law.

(Witness excused.)

LUIGI DI RICCO,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Luigi Di Ricco, and I operate El Lido Bocce Ball Alley and also the Bluebird which is run for me by Nello Nomellini. Nomellini did the buying and paying for the McHenry whisky. My signature is on Government's Exhibit 12 for Identifi-

(Testimony of Luigi Di Ricco.)

cation. Malaby gave me those to sign. I do not know whether any one was with him at the time because Nello handled the whole deal.

(Witness excused.)

WILLIAM H. BENSON,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is William H. Benson and I am in the general brokerage business, which is real estate and things like that. I was in Los Angeles for about ten years and am staying down here at the Stanford Hotel. I know Mr. Malaby and I know Newman by sight. I also know Cain, Shaeffer, and Files. I have known Malaby twelve or thirteen years and recall in the early part of last year introducing Malaby to Frank Spenger in Berkeley (307). On one occasion I went with Malaby to Spenger's place, to bring Spenger to San Francisco when they consummated their deal. I got off at the corner of Bush and Kearny in San Francisco and went to my [124] hotel, but I met Spenger a couple of hours later. We had come over to San Francisco in my car. I went to Files' office in connection with this transaction on several different occasions. I discussed with Spenger his transaction with Malaby. Spenger showed me the check that he had given in

(Testimony of William H. Benson.)

the deal. It is Government's Exhibit 4-A for Identification. He showed me it after it was endorsed and paid. He showed me the receipt after he came back from Files' office. After the check had been endorsed and paid I went to see Spenger, at his request, and subsequently went to Files' office on the transaction. This was also at Spenger's request. I went to Files' office alone first, and saw Files, and asked him if he had cashed Spenger's check. Files said he had, or rather that he had turned it over to some one, but he did not tell me at the time who it was. I called his attention to the terms of the escrow agreement being for ninety days, and he said it was his understanding that when the merchandise was to be delivered it was to be turned over. To my knowledge no merchandise had been delivered on April 24. There was no discussion as to the 90-day retention clause in Files' receipt. There was a discussion regarding getting Spenger's money back. As soon as I got through talking to Files I went back to my hotel and called Spenger and asked him if he would come over the following day and see me, and he did so. Then I had Files come to my hotel the next day and we went up to my room and discussed it; that is, Spenger, Files, and I. This was about a couple of weeks after the check had been cashed. The conversation between Files and Spenger was trying to work out something for the protection of Spenger in regard to his check, to protect him and to see

(Testimony of William H. Benson.)

what could be done in regard to returning the money. Files was willing to cooperate and do everything he possibly could, and Files [125] suggested we try to work out some sort of security for the protection of Spenger's money. Two different matters were mentioned. One was some lots that he was interested in and also some vegetable crop of some kind. No mention was made as to where the money had gone. I told Spenger and Files that I knew Cain personally and I would get in touch,—Malaby claimed to represent the International Import Company. Spenger asked Files where the money had gone, and Files didn't know; he turned it over.

Cross Examination

By Mr. McDonald:

Files told Spenger and me that the check had been turned over to Malaby.

(Witness excused.)

JOHN A. McKINNON,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is John A. McKinnon, and I am a salesman. In the early part of last year I met Oscar Lowenthal by selling him an insurance policy. That was a year and a half ago. I met him in con-

(Testimony of John A. McKinnon.)

nection with the sale and distribution for the International Import Company—that is, McHenry whisky—in March, or April, or May, when he told me he was going into the wholesale liquor business, and said he was going to see Malaby in three or four days. Malaby later talked to us about ten or fifteen minutes. I met Malaby at Lowenthal's home. Malaby said they were going to have a warehouse in San Francisco, and were going to hire some salesmen, and said that in a few days he ought to have things for us fellows to work with. In four or five days he gave us a piece of paper, stating the prices and amounts of whisky. One of the brands was McHenry. The price for the McHenry whisky on this list was \$56 or \$57 or something like that. Malaby gave me the list (318) when [126] Lowenthal was present, although I wouldn't swear whether he was right in the room at the same time. I went to work for Malaby, I think, although I really don't know who I went to work for. I got one commission. After I got this list giving me the prices I kept waiting for about a month for a letter authorizing me to sell the whisky, but I never did get such a letter. Later I went to see a friend of mine at the William Tell Hotel, and later I met Mr. Fuchslin. I showed Fuchslin the list of liquor and later had a discussion with him about the sale and purchase of liquor (324). He said he did not know how much liquor he could contract for at that time, and I told him he would have to go up on Kearny Street, and perhaps we could work out something (325).

(Testimony of John A. McKinnon.)

Mr. Malaby had previously told us about Files' office, and of the necessity of going there in connection with these transactions, and he had said that they had to leave a deposit at that office. Lowenthal and I were not authorized to take any orders, or any money, so Malaby said. I had told Fuchslin to meet me at Files' office, where Malaby would be the next morning at 10 o'clock; but Malaby wasn't there. Files and Shaeffer were there. I was to get five percent commission on the transaction. Malaby had told me that half of the money to be paid for the liquor was to be paid now, but I do not know how the other half was to be collected; but I think it was before the shipment got in there. The down payment was to be one-half of the total cost (329). I did not know anything about the ceiling price. There was nothing discussed or anything of that nature. Since that time, and since I have been around here, I have found out that there was such a thing as a ceiling price on whisky. When I went with Fuchslin to Files' office, there was no one there besides myself, Fuchslin, Files, and Shaeffer (330), and Fuchslin turned over something [127] like \$1200. He was counting out the money, and in the meantime I left the office because I didn't know whether I was permitted in there or not. The first time we met Malaby he told us that the money was supposed to be deposited in Files' office, and Malaby took Lowenthal and me down to Files' office and introduced us to Files and Shaeffer, but nothing was discussed at that time. He told us that

(Testimony of John A. McKinnon.)

we were going to represent him in that territory (332). He said whenever we had any deals to make to bring them to the office, and to meet him there. When I went to Files' office with Fuchslin, Shaeffer and Files were there, and I introduced Fuchslin, and told them he wanted to leave a deposit there for some liquor. Before I took Fuchslin inside, I discussed with him about the \$1200, which amount I had taken off the list which Malaby had given me; and I showed to Fuchslin from that list that he would have to pay down \$1200. Fuchslin then left in the office something over \$1200 cash. I did not see whether Files or Shaeffer gave Fuchslin a receipt for the money. Malaby was to give me my cut out of the money deposited. I was to get five percent of the total price. Later I met a friend of a friend of mine, a Mr. Becker, who operates a tavern, and when I asked him about getting some liquor he said he didn't have much money, but he gave me \$300 which I took down to Files' office. He wanted 25 cases, and the deal was never completed because I know that Malaby refunded this \$300 to Becker.

Cross Examination

By Mr. McGuire:

I think it must have been March or April when I first met Lowenthal regarding this transaction. I met him at his apartment, and he said he had just found out where we could go and sell liquor. He told me about it, and where we could get five percent commission. He told me Malaby was the man

(Testimony of John A. McKinnon.)

he had talked to; and that Malaby was a representative of the [128] International Import Company in Los Angeles; and said they wanted him to get a license to be a distributor, or a wholesaler; and that he had written to Sacramento. He was told to go to the Equalization Board here, and that Board told us to get a letter from the organization authorized to sell liquor. We were waiting for that letter all this time. The next time I saw Lowenthal was at his apartment, and Malaby was there, but we did not have much of a conversation. We asked him for a letter, and he said he would get it for us eventually. Malaby told us the Import Company was very responsible, and we found that out for ourselves (340). Malaby gave us the information regarding the price of the liquor; he said it would sell for \$57 a case, and that included the freight and all expenses. Nothing was said about the ceiling price. We were supposed to have cards, so Mr. Malaby said, and he also said that we would have an order book or something like that. We were not supposed to sign any orders, so Malaby said, nor collect any money. We were just to contact people, and turn them over to Malaby.

Cross Examination

By Mr. Ames:

I did not testify that Mr. Malaby was trying to get a wholesale license to sell liquor in California. It was Lowenthal that wrote to Sacramento. I never did get any letter of authorization from the International Import Company.

(Testimony of John A. McKinnon.)

Cross Examination

By Mr. Gillen:

I was the first man to contact Mr. Fuchslin through a Swiss friend at the William Tell Hotel (343). There was nothing said that night about the ceiling price. I went to meet Malaby at Files' office, around ten thirty the next morning, because he said he would meet me there. I went to Files' office and Fuchslin had not yet arrived. I had already met Files before that. I met Files outside and I told him I was [129] waiting for a gentleman to come down there, who wanted to deposit some money, and he said that that would be all right. I did not meet Mr. Fuchslin on the street. I was inside when I met Fuchslin. There was nothing discussed at Mr. Files' office about any ceiling price.

(Witness excused.)

JOHN De SILVA,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is John de Silva, and I had a business of a saloon in San Leandro. I had a transaction on McHenry's whisky in the early part of last year, and was first contacted by Newkirk. This was sometime in March or April. We talked alone. Later Newkirk brought Lowenthal in, and Lowenthal and

(Testimony of John de Silva.)

I talked after Newkirk left. Someone else was with Lowenthal, but I do not know who it was. We talked about the price being \$57 a case for McHenry Blended whisky (349). I saw a sample, but did not taste it. I ordered ten cases, and I was to give them \$285 in cash, and Lowenthal said the deposit should be in cash. I signed the purchase order when I picked the ten cases up in the warehouse. I think I signed the receipt for the merchandise when Lowenthal and the other man were there. That receipt is marked Government's Exhibit 25 for Identification, and the receipt for the merchandise is marked Government's Exhibit 25-A for Identification (351). Lowenthal left a card with me and I called, after I had waited about three weeks for the whisky, and got in touch with Malaby. He came to my place of business. When I gave Lowenthal the cash another man was with him, but it was not Malaby. I later telephoned to Malaby (352). When I signed Government's Exhibit 25-A, and the Invoice marked "Paid," Newman was there. When Malaby came over after my telephone call, he told me the whisky would be there [130] in a few days, and at that time he picked up the invoice price for the whisky. Both Newman and Malaby were there, and I do not know which one of them got the money. I later picked up the whisky at the warehouse. When Lowenthal and the other man that was with him got the cash that I paid down, I got a receipt which I believe I still have in my receipts at home (354).

(Testimony of John de Silva.)

Cross Examination

By Mr. McGuire:

Exhibit 25-A was given to me by Malaby and Newman, and at that time I paid the check. When Lowenthal first came to my place he was with Newkirk. I did not order any Cobb's Creek whisky. I bought two cases of Rock Creek whisky (356). Government's Exhibit 25 calls for ten cases of mixed whisky. I do not recall whether Exhibit 25 was given to me by Lowenthal or the man that was with him (357). I did not give this order to Malaby for ten cases of mixed whisky. No one delivered any part of that whisky.

(Witness excused.)

AMARO PITTA,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Amaro Pitta, and I am a tavern owner in Oakland and have been since February, 1944. In April or May of last year, I agreed to purchase a certain amount of McHenry whisky. I first contacted Mr. Malaby at my place of business. I had met him before at my place. I first met him in San Francisco when he was trying to sell a fellow some whisky, and I was badly in need of some whisky so he came over to my place and talked

(Testimony of Amaro Pitta.)

with me alone, about selling me some 100-proof McHenry whisky. My first order was for 100 cases of 100-proof. I signed an order slip at that time, at the price of \$38.73 a case. I was supposed to put up \$3200 in San Francisco. The order shows [131] on its face "No cash down," but I did pay at Files' office the cash. Shaeffer was there, and I gave him the \$3200 to put in escrow. Malaby was also there. They were supposed to turn this money over to Cain when I got delivery of my 100 cases of whisky. I was to pay out the price set out on the slip when the whisky was delivered. When I went to Files' office, Shaeffer was alone there. I got a receipt for the money; the receipt was signed by Files. Shaeffer said Files was at the race track, and it was all right for Shaeffer to take the money. The discussion concerning the terms of the escrow was between Malaby, Shaeffer, and myself (363). Later I gave another order for 25 cases of McHenry Blend whisky. That was May 31. I was negotiating with Malaby, and that was after I had put up the money in escrow for the 100 cases. The price on this was \$30.07 plus a certain amount of taxes, but there was to be additional payment so the whole thing all together amounted to \$57 a case. The difference between the amount appearing on the first sheet of Exhibit 14 and \$57 a case was paid in cash by me to Malaby. I received the 25 cases of whisky, but it was later quarantined by the health officer (365).

(Testimony of Amaro Pitta.)

(At this point, the documents marked, respectively, U. S. Exhibits 14 and 14-A for Identification, were marked.)

(Witness continuing:)

The 25 cases of the Blended whisky were eventually returned to International Import Company. I never did get the 100-proof whisky for which I had paid down a premium of \$3200. Later I went to Files' office, and to Shaeffer, and they kept promising me they would give me the money back, because I told them I needed it to buy other whisky to operate my business. Finally, I got them to sign a note that they would pay me in sixteen days, but when the sixteenth day was up they still [132] stalled me (366). I still have the note and it has not been paid. Exhibit 14-C for Identification is the promissory note.

Cross Examination

By Mr. Gillen:

I first met Malaby in San Francisco, and told him I needed whisky, and he went over to my place of business across the bay at my request. I made arrangements there with him to buy the first 100 cases of whisky. He told me the money had to be deposited in escrow in San Francisco, and he brought me over to San Francisco, and that is where I got this receipt. The names of Files was already signed to it when I got it. All Shaeffer did was to say how much money I was going to put

(Testimony of Amaro Pitta.)

up in escrow. He filled it in, and gave me the receipt that Mr. Files had signed.

Cross Examination

By Mr. Ames:

The first order that I talked about was 100 cases of McHenry 100-proof Bonded, with a McHenry label. I never did find out whether there was any of such liquor or not. I never did buy any other brand of whisky from Malaby.

Redirect Examination

By Mr. Licking:

When I went to Mr. Files' office and saw Shaef-fer, I turned the money over to Shaeffer. The only discussion was that I was to leave the money there in escrow until I received my liquor. It was to be held pending the delivery of the liquor.

(Witness excused.)

JOSEPH PORFIDO,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Joseph Porfido, and I live in Oak-land, and I am a bar owner. I know Pete de Georgis, and recall that early last year I was short of whisky and asked Pete if he could help me get some. I paid Pete some money. Afterwards [133]

(Testimony of Joseph Porfido.)

I received some whisky. George Bonanzo is my partner and he is the one who made the deal (370). I know two checks were issued, one payable to International Import Company. This was certified, and is marked Government's Exhibit 19-A for Identification.

(Witness excused.)

MANUEL COSTA, Jr.,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Manual Costa, Jr., and I work for my father (371) in a beer parlor in Oakland. During the first part of last year we bought, or were concerned in buying, some McHenry whisky. Malaby was in the place a couple of days before he and Nathan Newman came there. When Malaby first came there he introduced himself and then later he introduced me to Newman. They said they had whisky for sale—McHenry whisky—and that they would sell me 50 cases. If they gave me any price, I do not remember (374). I do not recall that I ever saw them again after that, but I made the deal right there. I do not remember exactly what the price was, but I believe it was \$60 a case. After I had signed the deal he asked me for \$1200 on the 50 cases. I gave them the \$1200 but got no receipt.

(Testimony of Manuel Costa, Jr.)

I got an order. I paid the \$1200 in cash. I usually pay my bills in cash. There was nothing unusual about paying this \$1200 in cash. I usually get receipts from other people, but not from these people. I got nothing to show for the \$1200. I ordered 50 cases (376). The first sheet of Government's Exhibit No. 13 for Identification has my father's signature, and is an order for 50 cases of straight bourbon bonded whisky. That is the whisky we got when the Government came around and took it away. The next two papers on that exhibit have my signature on them and show [134] 50 cases of McHenry's Reserve; but we never got it. This paper that I signed showed the amount of \$1809 had been paid. That is the amount of the certified check. The \$1809.50 certified check debit is marked U. S. Exhibit 13-A for Identification. I did not make the deal for 50 cases of straight bourbon, and know nothing about that deal.

Cross Examination

By Mr. Cannon:

Malaby and Newman came in together one morning about nine-thirty, and I gave them \$1200. Before that I had never seen anybody about this deal.

Cross Examination

By Mr. Ames:

I know nothing about the deal shown on Government's Exhibit 13-B, which has my father's signature.

(Testimony of Manuel Costa, Jr.)

Redirect Examination

By Mr. Licking:

I know that the \$1200 I paid was not on the order that my father signed.

(Witness excused.)

RICHARD NEWKIRK,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Richard Newkirk, and I manufacture valves for the penicillin program, and live in Berkeley. Early in 1944 I was employed as manager in a gas station. I know Lowenthal and have known him about ten months. I met him through a mutual friend in San Francisco in a bar. Lowenthal said he was a liquor salesman. It was sometime along in March or April. He told me if I met anybody who wanted to buy any whisky to let him know, and he would give me part of his commission. He did not give me any idea of price or quantity, and did not say who he was working for. Later I was down to Johnny de Silva's place, where I used to go to cash my checks (382), and de Silva said he was short of whisky and I [135] told him I thought I knew where he could get some, and I took Lowenthal out and introduced him, and I left and went back to work. Lowenthal was going to give me

(Testimony of Richard Newkirk.)

5%. Later Mrs. McNeil, who operates the Big Boy Barbecue, came to see me about buying some whisky and I called up Lowenthal and took him out there, and she bought some whisky. I did not hear the conversation between Lowenthal and Mrs. McNeil, but I remember part of it, and that was that it was to be McHenry whisky at \$57.50 a case, for McHenry Blended whisky. The next day I went back with Lowenthal to the McNeil place. It seemed there was a mistake, and Lowenthal had to go back and straighten it out. I think it was to get more money from her, but all I know about it was what Lowenthal told me. The first time we were there I saw money pass. Mrs. McNeil brought out a box with money in it, and counted out money to Lowenthal. I do not know how much, but it was quite a large amount.

Cross Examination

By Mr. McGuire:

Mrs. McNeil's bartender told me she got 50 cases of whisky. Later I heard Lowenthal call Mrs. McNeil over the phone, from my service station. Mrs. McNeil told me she was perfectly satisfied with the deal, and that all of her customers seemed to be satisfied, too, with the whisky. It was pretty good whisky.

(Witness excused.)

IRA BURNETT,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Ira Burnett (386). I am a roofer. I know Malaby and have seen Newman, and I know Rocco. During the early part of last year I met Malaby in connection with some whisky transactions. I believe it was in March, in San Francisco, [136] and I was introduced to him by a casual acquaintance named Miller. Malaby said he had a line of whisky he would like to introduce around here, and if I could hear of anybody to let him know. He told me it was McHenry whisky; and that he had several different lines on the same order (388). I gave Malaby my card, and he gave me his card. Later I saw him. This was in about two weeks. I had been to Santa Rosa and talked with Rocco, and there were several people who wanted McHenry whisky, but I did not know anything about the price until we had had our meeting; that is, until I had talked to Mr. Malaby. He asked me to arrange a meeting between him and Rocco, and he told me the price of the McHenry whisky was \$51. and something, but the price changed (390). Later I went back and talked with Rocco, and told him the story I have just told here, and he said there were three persons up there who had been after him for whisky. A few days later Malaby furnished me with a sample of whisky, but not with any order blanks or receipts

(Testimony of Ira Burnett.)

at that time. I gave Rocco the sample of whisky, and gave him the price that Malaby had given me, but it subsequently raised some \$6.42 from the quoted price of \$51. At the time Malaby told me about the price he told me the above ceiling price could be paid before delivery of the whisky (391). I knew before the sale of the whisky was made that it was made above the ceiling price, and that it was contrary to law. Rocco was in the saloon business himself, and had two bars in Santa Rosa. A few days later Rocco called me, and told me that he had three orders for whisky, and said he had taken deposits for the overage. The price then was \$57.50, and he had taken the overage on that basis. I reported that to Malaby. I was then furnished by Malaby with papers or documents to be used in filling these orders. Government's Exhibits 16, 17, and [137] 15 for Enrico Barrotti at Santa Rosa, Charles Ferretti of Sonoma, and Johnson and Lichtenberg at Boyes Springs (392), were the ones which he gave me, and I had them all three executed. They were signed by Malaby when he gave them to me; that is, the first two were; the third one bears no signature. After I had had these Exhibits 15, 16 and 17 for Identification executed, I returned them to Malaby, and heard nothing more about them until things began to happen, which was after the first whisky had been delivered. The money that had been collected was turned over by Rocco to Malaby, in my presence. Neither I nor Rocco, so far as I know, got anything by way of

(Testimony of Ira Burnett.)

commission or any profit out of these deals. After these papers were signed, I phoned to Los Angeles once and tried to get hold of Malaby, to see if I could help things out or why the liquor did not come, or what could be done. That was just after the liquor had been confiscated, and had proved to be unacceptable to the customers (396). I called up the International Import Company, three times, but I think I only made a connection once, and that was with Malaby. Each other time I was told that Malaby or Newman were out. After this thing broke I urged Malaby to return the money, both the money that the people had paid for the invoice price of the whisky, and also the money that they had paid for deposit. I do not know of any that was returned. That is the last of my activity.

Cross Examination

By Mr. Cannon:

The arrangement for my commission had never been worked out definitely, but Malaby told me that he would take care of me for my time and trouble; and at the time that this sale was made he told me while the money was on the table at Rocco's house that there had been a raise in the price of the cost of the whisky, and there wasn't anything left for me; he was [138] sorry, but that was the way it was. Rocco paid this money to Malaby in cash. I believe it was \$5000 and something in currency. At the time I saw Malaby get this \$5000, Exhibits 15, 16, and 17 for Identification had not yet been signed. Later, even though Malaby

(Testimony of Ira Burnett.)

told me I was not going to get anything out of it, I went back and got these signatures as a favor to him. Malaby did not threaten me. No one ever suggested to me that I was liable to be indicted in this case. Mr. Bird of the OPA did not say one way or another. He took a statement from me and left my house. I was present when Malaby made out these sales slips to be signed by the customers, and I saw him sign them. Newman made them out in the Palace Hotel. Both Malaby and Newman were writing on them. I believe they were written by hand. I did not see them do any typing. I noticed that Exhibit 15 for Identification had typing on it. They both signed something in regard to these things but I cannot find any of them that are signed by Newman.

Cross Examination

By Mr. McGuire:

I first met Malaby about March 1944, and he asked me if I knew anybody who would be glad to have some of his whisky, and I told him I knew of several people who needed it. The price was not discussed. I saw him two weeks later, when the price of \$51 was discussed. He did not give me a breakdown of how the \$51 was made up. I did not ask him for it. I do not remember whether at that time he gave me any blanks or order slips of any kind (403).

(Witness excused.)

GUS GOLDSTEIN,

a witness for the Government, being duly sworn,
testified;

Direct Examination

By Mr. Licking:

My name is Gus Goldstein (405). I am manager of the [139] Warrant and Chief Petty Officers' Club in San Francisco, which is a non-commissioned naval officers' club. We have a bar there. During the early part of last year I recall a transaction concerning whisky. I first met Malaby and Newman. I subsequently met Cain. In the latter part of January 1944 I met Malaby in my place of business, when I was short of whisky, and I told him so and he said he was in a position to get me some; and said he had a couple of men whom he could introduce to me, who would supply whisky to me. There was no discussion of price at that time, but I knew there was a ceiling price on whisky. I met Malaby several times thereafter. I do not know exactly when I made arrangements for the whisky, but I know that the consummation of that agreement was made on or about January 31. In all of the negotiations I first had, Malaby was the party I dealt with; but Malaby introduced me to Newman before the deal was finished. This was early in January. When the deal was finally consummated Nathan Newman, Morrie Newman, and, I believe, Malaby were there, at the St. Francis Hotel, in one room. I made the appointment through Malaby with both of the Newmans to meet them there, and I carried on the conversation with everybody

(Testimony of Gus Goldstein.)

present (410). I am not positive whether Malaby was there during the entire transaction or not. We discussed the price of whisky to be furnished, and the manner and method of payment. Mr. Newman advised me that it would be necessary to pay some money down, and it would be held as a deposit, and this money was not to be touched until such time as the whisky was to be delivered, and at that time the balance of the money would be paid. The money to be paid down was something over \$20 a case, and the payment which was to be made when the whisky was delivered, was the ceiling price. I ordered 20 cases and made a deposit of \$20 a case over the ceiling. [140] During the course of making that deposit I met Files and Shaeffer, and I made the deposit at Files' office in the amount of \$4400 and some odd dollars, and git a receipt for it signed by Files. Nathan Newman went there with me (412). There was no conversation in the presence of Schaeffer and Files relative to the transaction, which I had previously arranged at the St. Francis Hotel. Mr. Files was instructed to hold the money for me, and to be released by me at a later date; but nothing was said as to the transaction. I was to give Files instructions and then the money was to be released to Mr. Newman at a certain time. There was no agreement at that time as to the fee he was to get for his services. Sometime later Nathan Newman came and told me the whisky was in Los Angeles, and that the money was needed to take up a sight draft or bill of lading attached to

(Testimony of Gus Goldstein.)

the draft, and that if I would release the money and give it to him, my whisky would be sent to me promptly. He first asked for \$7280, which was the ceiling money, and when I agreed to give him that, then he suggested that I release the money which was being held at Files' office; and I did that. I then gave the receipt that Files had given me to Newman, and paid the balance on the ceiling price for the 200 cases. I got a receipt, dated April 11 1943, which is an error because it should be 1944. Subsequently I got back part of the money which I had turned over. I got \$1500 from the International Import Company, signed by Nathan Newman, and I got some money back from Malaby, and that was the entire amount of the over ceiling. The photostat copy of a receipt, dated 6/5/44, "Received of Charles Malaby total of \$4032 in full repayment of loan" signed "Gus Goldstein" bears my signature. I have never made Malaby any loan. When Newman came to get the check in payment of the invoice, he paid me back four hundred odd dollars, which I [141] was lead to believe was because the ceiling price had been violated, and the repayment of that money was necessary to bring the cost of the whisky down to within the ceiling price.

(At this point, U. S. Exhibit 26 and 26-A for Identification, were marked.)

Cross Examination

By Mr. Cannon:

I do not own that Club where I am manager, but I hold the liquor license, and I am the sub-lessee

(Testimony of Gus Goldstein.)

of the premises, and I knew when I contracted for this liquor I was violating the law. I gave Malaby a receipt for a loan because that is the way he suggested it, and I knew I was giving the receipt in that way for the purpose of covering up, because it was a violation of the ceiling, and I knew I was committing a criminal offense in buying or contracting to buy liquor over ceiling (417). I have not been promised immunity in this case. My primary object in entering into this transaction was to get some whisky, and I did not necessarily intend to commit a crime (418). Malaby gave back the \$4032 because I demanded the return of my money and wanted to close the deal. I got in touch with the International Import Company in Los Angeles, and asked them to return my money, and they sent it up by Mr. Malaby. I talked with Mr. Newman, but I did not tell him that if he didn't send the money back that I was going to prosecute him. I have never threatened prosecution of any of these men, but I did swear out a complaint. I do not recall that I ever talked to anyone except my wife and my attorney about prosecuting these men.

Cross Examination

By Mr. Ames:

I did not telephone Cain and tell him that if he did not bring me back all of my money that I would have him put in jail. I did not give such a message to Miss Anderson, Mr .Cain's secretary. I first met Mr. Cain personally in [142] January, 1945, in my attorney's office; but I did not threaten to put him

(Testimony of Gus Goldstein.)

in jail. I did swear out a warrant for his arrest. The warrant was sworn out before I talked to Mr. Cain and his attorney in my attorney's office (422). I had called Mr. Cain on the telephone in Los Angeles, but I do not know when it was. It was after I got the \$4000 back from Malaby. At that time I was only demanding from Cain the money back on the whisky that had been condemned; the ceiling price.

Re-Direct Examination

By Mr. Licking:

When I telephoned down to the International Import Company about the return of the money which I had deposited with Files, and which was subsequently turned over to Mr. Newman, I spoke to Nathan Newman, Morrie Newman, and Mr. Cain (423). I do not recall whether I had spoken to Cain before Malaby paid back the \$4000. I spoke to Nathan Newman in Los Angeles about the return of the money, and it was after that conversation with him that Malaby came to San Francisco and gave me the money.

Re-Cross-Examination

By Mr. Ames:

The liquor I bought was not condemned. I bought Doggerty (424) straight whisky. It was not McHenry Reserve. Nathan Newman and Morrie Newman promised to deliver that to me. The name of the whisky was never discussed between Cain and me. I do not know whether Cain or anybody else ever had any Doggerty whisky I have never seen a bottle of it.

(Testimony of Gus Goldstein.)

Re-Cross Examination

By Mr. Cannon:

I delivered \$7280 to Mr. Newman in a check. Malaby was not there, and Newman gave me a receipt which had Malaby's name on it. When I asked him why he hadn't signed it instead of Malaby, he said it was because Malaby was the salesman for that territory. [143]

Further Redirect Examination

By Mr. Licking:

I have some other papers or memoranda in connection with this transaction. The letter dated April 17, from the International Import Company, acknowledging receipt of a cashier's check that I had turned over to Mr. Newman, has now been marked U. S. Exhibit 26-B for Identification. Malaby never got any whisky for me at all, but I did receive ten cases of Rocky Springs whisky through various transactions with Malaby. This was shipped from Los Angeles, and I paid the freight on it as it was supposed to have been part of the whisky that I had paid for; and it was sent to me after I had been in contact with the Newmans in Los Angeles, asking for delivery. I examined it and then rang up Los Angeles, the International Import Company, and told them that the whisky was not acceptable for my use, and I demanded that they take it off my hands. Malaby came up to the place and picked it up. All I had paid for it was the freight, which they did not refund to me. The letter which I received is marked part of U. S. Exhibit 26-B for

(Testimony of Gus Goldstein.)

Identification, and the Valley Express Company receipt and the invoice attached is marked Exhibit 26-C for Identification.

Further Recross Examination

By Mr. Ames:

I presume that the \$7280 that I sent to the International Import Company was the ceiling price of the whisky that I ordered, but I am not positive as I have no way of knowing. The amount of the check that I sent was intended by me to be the ceiling price. I notice that in the receipt, 26-C, which Mr. Malaby signed, he stated that he was acting as the agent for the South Pacific Wholesale (429) Company. I wrote it in there because that was the agent that sent me the whisky.

(Witness excused.) [144]

LESTER G. WILLIAMS

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Lester G. Williams, and I live at 486 Ellis Street (431) and recall a transactions early last year in connection with McHenry whisky. I first met Malaby in that transaction; and later met Morris and Nathan Newman; and later, Files and Schaeffer. Malaby came to my place of business and introduced himself, and told me he had

(Testimony of Lester G. Williams.)

whisky to sell if I was in the market for some. I knew there was a ceiling price on whisky. He told me to come to the St. Francis Hotel to meet the other boys, and he gave me a sample of the whisky—McHenry brand Blended. This was about March 1. I went to the St. Francis Hotel and there met the two Newmans and Malaby. We talked in general about the whisky situation, and they said that I would have to put up some money in order to get this carload of whisky out here, so that I could get my part of it. I think the price was around \$57 a case, and I was supposed to put up \$10,255 at that time on 500 cases. The ceiling price was not then discussed. The balance was to be paid by me when I received notice the whisky was there. I did not make any payment for several days. At the Hotel they told me, if I decided to put up the money, to go down to Files' office and he would handle the escrow arrangement through his brokerage office. It was three or four days after I had met them in the St. Francis Hotel that I deposited the money with Files. When I went to Files' office, Schaffer, Nathan Newman, and Malaby were there, and Mr. Files; and the deal was discussed along the line that this money was supposed to be put in escrow and if delivery was not made within ninety days I was supposed to have the money returned to me. The balance of the purchase price on the 500 cases was supposed to be paid on delivery of [145] the whisky in San Francisco. Later I signed a document, when I was with Malaby. I received a

(Testimony of Lester G. Williams.)

receipt from Files in regard to the \$10,255 when I put the money up. Files wrote the terms, that the money would be returned to me in ninety days if the whisky had not been delivered at that time. Later Malaby brought me another paper. This was a few days, or maybe a week or ten days after I had deposited the money with Files. Although Nathan Newman called my wife at home, a little later, and asked her if it was possible for us to put up the balance of the money, she said, emphatically, "no," and we never did put up the balance. As a result of the conversation I had with my wife, we did nothing more about it; but later I had a second call, on the phone, and Newman asked me for the balance of the money, and I said I was not going to put any more money until I received some merchandise (437). The ninety days finally elapsed, and on the morning of the ninetieth day I went down to Files and demanded back the \$10,255. I did not receive it right away. It took probably three or four days before I had received the full amount back. Malaby first gave me a payment of \$1135; and the second payment was made at Files' office by Nathan Newman, for the total of \$10,255. I never did receive any whisky.

(At this point, U. S. Exhibit 27 for Identification was marked.)

Cross Examination

By Mr. Cannon:

Mr. Cannon: Q. What was the date that you went to Mr. Files' office and met Files and Schaffer and Malaby and Newman?

(Testimony of Lester G. Williams.)

A. Well, it was right—all the time was tied in together. I don't remember the exact date. (438)

Mr Cannon: I might state to the Court the reason I am asking, if it was March 10, this is the first overt act you plead about in the indictment. You plead about an overt [146] act without further——

Mr. Licking: I am not quite certain that this particular transaction is not set out in the overt acts in the indictment.

Mr. Cannon: The reason I ask, it is along the line of the motion I have heretofore made and to the demurrer filed. It was alleged that overt act No. 1, on or about March 10, 1944, that the defendants Nathan Newman, Charles Malaby, R. H. Shaeffer, W. O. Files met at 309 Kearny Street, San Francisco, California, and (2) on or about March 11, 1944, the defendants Charles Malaby, Nathan Newman and so forth. No further details are given, and I want to know—I think I am entitled to know either now or sometime which overt act that is. I was wondering if this is the one, or do you know whether this is the overt act you refer to in No. 1? I believe I make myself clear to the Court.

The Court: Yes.

Mr. Licking: Well, for the purpose of argument if may be assumed it is.

Mr. Cannon: Then at this time I would like to have counsel indicate—or before he closes his case indicate—which of these overt acts applies to each witness. In other words, no details having been given as to overt acts, conversations or (439) meet-

(Testimony of Lester G. Williams.)

ings, no details having been given, we are at a complete loss to know what overt acts he is talking about.

Mr. Licking: Well, we will defer it. I take it under the law I have to prove only one of these overt acts.

Mr. Cannon: Surely.

Mr. Licking: If I don't prove at least one of the overt acts, then the case isn't any good. That is the way I am going to leave it. I am not going to say witness X is proving several overt acts.

Mr. Cannon: Or offer to prove it. [147]

Mr. Licking: No.

Mr. Cannon: If that is counsel's position and if the Court sustains him in that, I want your Honor to keep it in mind, because it will have a very material bearing in our motion in this case.

The Court: It may be that he won't resist your motion.

Mr. Cannon: Of course, we have heard of things of that kind. I want to call it to your Honor's attention, because there are no details given as to when a violation or an overt act occurred. (440)

Redirect Examination

By Mr. Licking:

I went down on the ninetieth day, and got my money. The only way I could establish a specific date would be to look at my bank account and see the time I deposited that money in the bank. The \$9000-odd that I got from Newman was paid in cash. I believe I deposited it the next day. I did

(Testimony of Lester G. Williams.)

not get any money on the ninetieth day; it was a matter of a week before I received my full amount of money. Malaby first came to the tavern and paid me \$1135. This was after the ninetieth day—probably the ninety-second day. That amount was deposited separately. Files was in his office when I came there on the ninetieth day. I talked with him. Shaeffer was there, but I had no conversation with him. Files said that Newman had the money. He did not say whether it was Nate or Morrie that had it. A few days later I received my money (443).

(Witness excused.)

PRIMO ROCCO

a witness for the government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Primo Rocco, and I am unemployed now. I did own a tavern in Santa Rosa. I am a defendant in this action, [148] and I have discussed the matter of taking the stand with my counsel, and I know that I do not need to testify unless I desire. I know that anything I say may be used against me. I know the defendant Charles Malaby. I do not know any of the other defendants. I am familiar with the factual bases leading up to this indictment, and the particular transactions involving Lichtenberg and Johnson, Enrico Barrotti, and

(Testimony of Primo Rocco.)

Charles Ferretti (445). I was first contacted by Harry Burnett, who is a contracting roofer. He came to my house with a friend of his, in April, I believe, of last year.

Q. What was your conversation with Mr. Burnett?

Mr. Cannon: I understand we have a running objection to this as being hearsay, and reserve the right to strike it.

Mr. Licking: Yes.

The Court: For the record, note an objection. Objection will be overruled.

Mr. Cannon: Exception. (447)

(Witness continuing:)

Burnett wanted to know if I wanted to buy some whisky and I asked him what he had and who he was working for, and he told me the International Import Company; but I do not remember the brand of the liquor. If I remember right, he said the price was \$57. I knew then that there was a ceiling price on it. He said the price would be \$57.50 in cash, of which I had to pay part at the time the order was placed, and then when the merchandise was delivered I was to pay the balance. I did not ask him what the ceiling price was. About a week later he came back. Later, John Costa asked me if I knew where he could get some whisky, and I told him that Burnett had been to my place. Costa asked me to bring Burnett over to Barrotti's place, and I told Burnett to go over; and I introduced him to Barrotti, later in April. No money was paid then,

(Testimony of Primo Rocco.)

and no documents were signed then. Barrotti gave an order for 200 cases. Later Barrotti paid some money over to me, while Burnett was present, because Barrotti did not want to give Burnett the money because he didn't know him; and Barrotti asked me if I would hold the money until he could investigate, and find out whether the Company was operating and was sound. I told him I would hold it. I had no agreement with Burnett as to any commission, and I did not retain any part of the money. Barrotti told me that when I was sure that he would get delivery of the whisky I was to turn the money over to Burnett. I did not know then what the ceiling price was, or how much was to be paid, or anything like that (451); but I did know there was a ceiling price. Costa had told Johnson about the whisky deal, and Johnson called me up and told me to get hold of this man who was selling whisky; and I told him the man had gone back to Oakland. He then told me to call him up and put in an order for 50 cases; so I called Burnett on the phone, and told him the man would have to have about 50 cases; and Burnett said that he did not have the gas, and to tell him to leave the money with me, and he would pick it up on his next trip. So Johnson brought the money over to me, and turned it over. It was something over \$1000, as I remember. Then Johnson brought Ferretti, (452) who only wanted 25 cases. Johnson made his deposit one day, and he came back the next day with Ferretti who bought 25 cases. Later on, invoices were executed, or receipts given. Burnett brought them. They were exe-

(Testimony of Primo Rocco.)

cuted after the money had been paid over. I was present when Burnett had these documents signed, but I did not see them actually signed. I gave Barrotti a receipt, shown in Government's Exhibit 16-A for Identification. Later I turned the money I had received over to Burnett and Malaby together. The [150] whisky had not yet been delivered, although some of the people in the bay area were getting deliveries; and as soon as I felt sure that they would get the merchandise, I turned the money over. That is what Barrotti told me to do; but Johnson and Ferretti told me to turn it over any time. They did not ask me to wait until I was sure that they would get their liquor. I did not get any receipt for the money that I turned over. There was no discussion between me and Malaby as to any payment I was to get on the transaction. After the merchandise came, Burnett got in touch with me. He had read in the paper that the State officers were condemning the liquor because the merchandise was not what it was supposed to be, or something like that (455). Burnett said the whisky was bum, and he said that I ought to tell them not to accept it. I saw them later but they had already received their stuff. I made an attempt to collect the money which had been turned over to me, and which I had turned over to Malaby, by contacting Burnett. I told him to come up and see the fellows; and I told Burnett to get in touch with Malaby. In my presence, Burnett called up the International Import at Los Angeles and asked for Malaby. I think I made two or three calls, and the last time I talked to Malaby

(Testimony of Primo Rocco.)

by phone, Burnett had called him, but I asked Burnett to let me talk to him—and he did. I told Malaby that Barrotti wanted his money, and he did not want any merchandise. I told him that if the money was not sent up I was going to see the District Attorney; and he told me that he would send it right up, and asked who to send it to. I told him that he had the invoices, and knew who to send it to. Two days later I got a notice from the Western Union that there was a money order up there for me. I went up there and a check for \$1000 in my name was there. I took it and turned it over to my attorney; I did not cash it (458). I did not see Malaby again after [151] that until I saw him in Court. The check and telegraphic notice of money order is marked U. S. Exhibit 28 for Identification. I have handed you an envelope addressed to me on the stationery of Burnett to the International Import Company, and a letter signed by Charles Malaby, addressed to Burnett. I received these from Burnett, and they are marked U. S. Exhibit 29 for Identification.

(Witness excused.)

CHARLES MALABY

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Charles Malaby, and I am one of the defendants in this case, and have heretofore pleaded guilty, after I had been advised of the nature

(Testimony of Charles Malaby.)

of the charge. I have heretofore been convicted of a felony, in 1928, for receiving stolen property, and I served time. I know all of the defendants. Government's Exhibits 22 and 22-A are photostatic copies of letters of authority to me from the International Import Company. I know Mr. Cain's secretary, Miss Anderson. She has been in and about the court and in the hallway outside the court during the last three days. The day before yesterday I had a conversation with her.

Mr. Ames: Your Honor please, I cannot see the relevancy of this in the matter. Miss Anderson is Mr. Cain's secretary; no question about that.

Mr. Licking: Miss Anderson is also, I am informed, to be a witness in the case.

Mr. Ames: Very possibly.

Mr. Licking: Well, you stated that to me and asked me to overlook the fact she had been in court here.

Mr. Ames: Correct.

Mr. Licking: And I said I would overlook it, and you [152] might call her. (461)

This is material, your Honor—there is no possibility of any prejudice; there is no jury here.

Mr. Ames: I was wondering what materiality it could have.

Mr. Licking: Well, I intend to prove that she attempted to dissuade this witness from testifying, and in that connection mentioned your client, Mr. Cain. I think that is quite material.

(Testimony of Charles Malaby.)

Mr. Ames: The question is here, what difference does it make?

The Court: It may or may not become material. I will allow it subject to a motion to strike and over the objection of counsel.

Mr. Cannon: I want to make the record clear. As far as Mr. Newman is concerned, I object particularly on his behalf in view of the fact it is something which occurred long after any plan or scheme in the indictment, and therefore under *United States v. Pettibone*, could not be admissible.

Mr. Licking: It is not admissible and not offered as to any of the other defendants, or as to the merits of the case. It is offered merely as to the interest or bias of this particular witness should she become a witness.

Mr. McDonald: Exception.

Mr. Licking: Did you have a conversation with her the day before yesterday? A. Yes.

Q. State what happened, how the conversation arose.

Mr. Ames: I object to all this line of testimony and note (462) an exception.

(Witness continuing:)

She walked out in the hall and moved her head for me to come over, and said, "Mr. Cain has two good lawyers in there to help you," and I told her I did not need any help, and that [153] I did not need any help, and that I had already pled guilty, and that was the end of the conversation. I had another conversation with her yesterday.

(Testimony of Charles Malaby.)

Q. State the occasion of that conversation.

Mr. Ames: The same objection.

The Court: Same ruling.

Mr. Ames: Exception.

The Witness: She said, "What do you want to testify for?" I said, "Why not?" She said, "Why don't you stand on your constitutional rights?" I said, "Why should I? I already pled guilty. Now, I am going to tell the truth." She said, "Mr. Cain has two good lawyers in there; they are going to tear hell out of you." I said, "I don't care. I will tell the truth and always tell it."

Mr. Ames: I move that all that testimony be stricken out as entirely superfluous to the record in this case; it proves nothing.

The Court: It has no relation to the merits of the case.

Mr. Ames: Nothing whatever. (463)

(Witness continuing:)

I have already pleaded guilty to a charge which, in general terms, is that I entered into and was party to a criminal agreement with the other named defendants for the purpose of selling whisky at a price over and above the ceiling price established by law.

My first associate in the matter was Nathan Newman. We talked in Los Angeles about going into the whisky business, and Newman said that he could go back east and get some whisky. That was Morrie Newman (464). I told him that would be fine. That was in January of 1944, I believe. We talked

(Testimony of Charles Malaby.)

several times, and then Nate and Morrie Newman and I came here to [154] San Francisco. My financial condition at that time was not very good. We came to San Francisco to see if we could get a wholesaler to handle the whisky that we were going to bring in from the east; but at that time we did not have in mind any particular brand or kind of whisky (465). In our efforts to get a wholesaler we met Shaeffer, whom I have known for many years; and I asked him if he could help me get a wholesaler, that we were going to bring some liquor in here. He told me he would try. I took Shaeffer up to the St. Francis Hotel and introduced him to Nate and Morrie Newman. They also asked Shaeffer to see if he could get a wholesaler. We fooled around about a week or so, and did not get a wholesaler. Meanwhile, I was looking around to see if I could sell some whisky, and I went to see Mr. Williams and told him we were going to bring some whisky here, and asked him if he was interested. He said he was, and would buy 500 cases if I could get it. I told him that I had two gentlemen with me and wanted him to come to the St. Francis and meet them. Up to that time I had not told him of any price. He came up to the St. Francis Hotel, and I introduced him to the Newmans; and we talked about the 500 cases of whisky. He said he would think it over and let them know the next day. The next day, he came back, I believe. At that time we did not have the McHenry Reserve whisky, but he was quoted a price which I believe was around \$52 or \$53. That quotation was given to him by the

(Testimony of Charles Malaby.)

Newmans and also by me. The next day after our first talk, he came to the Hotel and talked with Nate Newman, but I do not think I was present. After this meeting I talked with Newman about it. He said that Williams was going to talk it over with his wife, and would be back the next day. I was present when he came the next day, along with Newman. That was during the month of February, I believe. On this third visit he said that he was willing to buy the 500 cases, but wanted to know [155] where he could deposit the overage, which was the difference between the ceiling price and the price we were to charge him. That had been discussed between me, Nathan Newman and Morrie Newman. We had not previously discussed the method of payment of the overage, and we did not have anyone at that time to escrow the money with. Mr. Williams mentioned the necessity for some escrow holder. I then went to my friend Shaeffer, and asked him if he knew someone he could get to act as escrow holder, and he said he would speak to Files, and see if Files would consider handling it. Later Shaeffer told me that Files would handle it, but he did not want to know about whisky; and that when the people would bring their money in, they should not mention whisky, that they should leave their money, get a receipt, and walk out. Files did not want to know about whisky; nor to talk about it. Mr. Newman made the deal with Files, and my understanding is that Files should turn the money over right after the people had left it (470) at Mr.

(Testimony of Charles Malaby.)

Files' place. This money that was collected was used to finance our operation. At a later date, Williams and his wife, and I believe Newman, went to the office of Mr. Files. I was not there, but Mr. Files was. Later I talked with Nate, and with Williams, and with Files as to what occurred, and learned that something around \$12,000 had been turned over by Williams to Files; and Files said he turned it over to Newman. I do not remember whether Files said that in this deal he took out his commission; but he usually does. The commission which Files was to receive started, I believe, around 4%; and then he wanted 5%. That is what he was getting. There were other rewards talked about, but he never did get any. After the Williams transaction, the next one was with Goldstein, who told me he would like to buy a couple hundred [156] cases. I took him over to the St. Francis Hotel, and introduced him to Nate and Morrie Newman. The Goldstein transaction was maybe two or three or four days after the Williams transaction. During that period Nathan Newman and Morrie Newman were registered at the St. Francis Hotel under their own names; and they were up here about two weeks then. I introduced Goldstein to Morrie and Nate Newman at the St. Francis, and we talked about the deal for 200 cases. Goldstein said he wanted to buy very good liquor. He had been promised some liquor at that time by the name of Daugherty, or Doggerty (472). He said he would like to escrow the difference between the ceiling and the price

(Testimony of Charles Malaby.)

that we agreed upon. I think the price we agreed upon was \$55 or \$53. Goldstein made the deal with the Newmans. Later he deposited the overage with Files, but I do not remember the exact date. Government's Exhibit 26 for Identification, dated April 11, 1943—that is the date when the Goldstein order was signed. He might have deposited his overage; and we might have written the order afterwards. That happened in many cases; and April 11 on the order would not necessarily determine the date of the deposit. In the Goldstein transaction, we never did get the Doggerty whisky. We had made a contract with the McHenry, and asked him if he would take McHenry, and he said “no” that he wanted straight whisky; and he wanted to cancel his order. He did so. Before the car of McHenry whisky arrived Newman came to San Francisco and we went around and collected the ceiling on this liquor, for which we already had deposits with Files. Newman went to Goldstein and collected the ceiling of \$7280. He had also paid down some money to Files, as I recall something around \$4500. I paid him back \$4500 from money that I had collected from different sales that I had made, and some overages that I [157] had received, but not from money that had been deposited with Files. For a while all the money that Files received was to be turned over to Newman, and then I told Newman he ought to instruct Files to turn the money over to me in case Newman was not there, and Newman gave Files those instructions. Government's Exhibit 26-A for Identification is a receipt for the money I gave

(Testimony of Charles Malaby.)

Goldstein. I have the original but do not have it with me.

Q. Up to that time was the defendant Burt Cain in the agreement or picture?

A. No, he was not at that time.

Q. He was not at that time. When and how did he come into your picture?

A. Well, we were still trying to get a wholesaler, and Mr. Newman went back to Los Angeles, and I was still trying to get——

Q. Which Mr. Newman went back to Los Angeles? A. Nate. (476)

(Witness continuing:)

I was in San Francisco trying to get a wholesaler, but was taking orders. I phoned Los Angeles a week or two later and Newman told me not to try to get a wholesaler any more, that they had a wholesaler down in Los Angeles. Newman came to San Francisco and told me they had a wholesaler, and when I came to Los Angeles I would get my credentials and we could do a lot of business. I went to Los Angeles.

Q. About what time was that?

A. In March (476).

Q. You speak of getting your credentials. Did you get them on this trip to Los Angeles?

A. When I got to Los Angeles I went to the office on LaBrea Street, and they introduced me to Mr. Cain.

Q. When you say the office, what office do you mean? A. International Import Company.

(Testimony of Charles Malaby.)

Q. You were introduced to Mr. Cain at that time?

A. I was introduced to Mr. Cain, and he was very glad to see me. He [158] said, "I heard a lot about you, and I like you." (477)

(Witness continuing:)

Up to that time the \$12,000 collected from Williams and the \$4500 collected from Goldstein had been given to Newman, less Files' commission. The day that I met Cain we did not talk very much, but the next day I came back and we talked about the transaction, and I told Cain that I wished he would give me two letters of credentials, to show people that I was representing International Import Company; and he gave me those letters, and they are marked Government's Exhibits 22 and 22-A for Identification, and are dated March 22, the date I received them. I had arrived in Los Angeles a few days before that. The day that Cain gave me these credential letters we discussed the proposed plan of operations, while Cain, I, and Nathan Newman were present. Miss Anderson was not present at any conversation where we discussed the matter of overage or the general plan of operation. Those conferences were held in the back office, which is a little room where nobody could hear us.

Q. Did you disclose to Mr. Cain, or was Mr. Cain familiar with what had already been done, the fact you had collected the overage in these two cases?

A. He was familiar with it. (479)

(Witness continuing:)

(Testimony of Charles Malaby.)

On that day, we discussed the fact that Morrie Newman had contacted the Midvalley Distillery back east, and we were going to buy a franchise from them for \$2500 to handle their liquor in the State of California, and I was to come back up north and sell the liquor, or any other liquor that we could obtain. The overage that was collected was supposed to be sent down to the office in Los Angeles by Newman or by me; and when the money arrived in Los Angeles it was supposed to [159] be turned over to Mr. Cain. (479). Most of the overage money was turned over to Newman to take down to the office. I took money down to Los Angeles.

Mr. Licking: Q. Where in Los Angeles did you take the money?

A. I took the money this last time and give it to Mr. Newman, and Mr. Newman said he was going to take it to the office of Mr. Cain the next morning.

Mr. Ames: I move the last part be stricken out.

The Witness: How do you want me to say it?

The Court: Just a moment. You just answer the questions.

The Witness: Yes.

Mr. Licking: It seems to me it is a manner and method of carrying out a conspiracy.

The Court: This is a conversation by one of the alleged conspirators. The objection will have to be overruled.

Mr. Ames: Outside of the presence of the de-

(Testimony of Charles Malaby.)

fendant Cain, to whom this is supposed to relate, your Honor. It is hearsay as to him.

The Court: Mr. Cain would not have to be present with another actor in this conspirator so charged.

Mr. Ames: That remains to be seen. I will except to your Honor's ruling.

The Court: I am indicating to you my state of mind so you won't be taken by surprise. Proceed. (481)

(Witness continuing:)

There was \$10,000 deposited to Cain's account for the International Import Company, and that \$10,000 was given by Newman, and was from Spenger's overage, to pay for the car of whisky, in part. There was a discussion by Cain, when I got my credential letter, as to the price at which I had been soliciting orders in San Francisco. I told him I was getting \$55 to \$57 a case and that maybe I could get \$60, and he said [160] that was fine, but to be careful (483). Exhibit 8-A for Identification is an order which I believe Lowenthal took. These orders that we used had three copies each, a white, yellow, and blue. Government's Exhibit 26 for Identification is a receipt for money, and we used three different colors on that, just like the other—a white, yellow, and blue. One was for the salesman, one was for the office, and one was for the customer. At the time I got my credential letters from Cain, I was also given some stationery such as order blanks and other things; and then

(Testimony of Charles Malaby.)

I came back to San Francisco, and continued in the same line of activity as theretofore. Morris Newman was in Los Angeles. He was the buyer for the company and the general purchasing agent, and was the man who went back east and made the contract with the Midvalley Distillery to buy McHenry Reserve whisky and McHenry Special, and whatever other brand they make (485). Later I received some samples of McHenry whisky. It was a half a case of pints and a couple of fifths. I met Pete de Georgis of the Miami Inn a couple of months previous to this deal. He was the manager of a club in El Cerrito, and he gave me an order for 100 cases at \$49.50 a case. The ceiling was \$36.40 at that time, but they corrected it to make it \$36.19. He gave me the balance of \$2000 in cash, which \$2000 I turned over to Newman in San Francisco. Government's Exhibit 9 for Identification, which has the name "Charles Malaby" thereon, is not my signature. The ceiling on this order was collected by Mr. Newman while I was with him, but I do not know whether or not he signed my name to the order. At the time the ceiling was collected the receipt which we had given to Mr. de Georgis for the overage, was also collected. Newman got that receipt and tore it up. I recall a transaction with Martin Fuchslin which is embraced in [161] Exhibit 2 for Identification. McKinnon told me he took an order, and told the man to go to Files' office and deposit the money; and I asked Files if he deposited the money there

(Testimony of Charles Malaby.)

and Files said he did. A couple of months later I went to his place and signed an order for the whisky. That is Government's Exhibit 2 for Identification. McKinnon secured the original order and I secured the execution of the other copy, and got the payment at that time of the ceiling price; or rather, we did not collect the ceiling price until the whisky was on the way and ready to arrive. But we later collected the ceiling in the transaction. When they went to collect the ceiling, Newman asked Fuchslin for the receipt which Files had given him, and Newman got that receipt and tore it up. I recall a transaction in which a man named Becker, at the Red Raven, was contacted by McKinnon. He gave McKinnon \$300, and McKinnon took it down to Files and deposited it. I went to see this man afterwards and gave me some money in cash, but later on he cancelled his order and I got the money from Files and took it back to him and gave it back. I recall that Mr. Lowenthal contacted Mr. Thomason (488) and he brought him over to Files' office. I met Lowenthal there along with Mr. Thomason. Files was not there but the secretary was. We waited a little while and I asked her if she would call Mr. Files, and she did, and said there was a man there who wanted to deposit some money and he can't wait. I asked him if I could take the money and sign the receipt, and Files told me to go ahead, and I did. Government's Exhibit 7-A is the receipt I signed at that time. That receipt represented the overage, and

(Testimony of Charles Malaby.)

I later executed and caused to be executed the usual invoice and receipt reflecting the ceiling transaction. Exhibit 7-A for Identification are those papers, and the amount reflected in the invoice was collected by Mr. Newman [162] and I collected the receipt along with Mr. Newman, from Mr. Thomason's ex-wife, when she paid the money. Mr. Lowenthal contacted Elliot Smith and went over there several times, and finally asked me to go there, and I did. I met Lowenthal and Navinger (490) and we talked to Smith. Smith had the money for the overage and gave it to me. The deal had already been made, and Newman and I went over and got the money by certified check, as shown on Government's Exhibit No. 18 for Identification. I recall taking the cash from Gibson and Smith for the overage, but gave them no receipt. That cash was all ready, because Lowenthal had arranged the deal. I recall a transaction with Pete Reali. Benson introduced me to him, and made a transaction for 20 cases. I collected the overage and Newman and I went back and got the check for the ceiling, and caused Government's Exhibit 10-A for identification to be executed. Reali did not ask for any receipt for the overage. I recall a transaction in Stockton with a man named Vincentini (492). He came to San Francisco and ordered some liquor and I took him down to Files' office and he deposited, I think, \$2100, and owed about four or five hundred dollars. I went to Stockton and he paid me that money. That was

(Testimony of Charles Malaby.)

overage. The \$2100 he deposited with Files was not sufficient to pay the overage on his order. The overage amounted to around \$2600. We did not adhere to any set price for the whisky. I gave him a personal receipt for \$2100, but I forgot to take it away from him when he went to Mr. Files' office. But the \$2100 shown in my receipt is the same \$2100 that he deposited with Files. Files gave him a receipt. I did not know anything about the circumstances under which the promissory note shown in Government's Exhibit 3-A for Identification was given. I recall a transaction with Guy Caputo (493). I talked with him and he came to Files' office and met Newman, [163] and bought 500 cases of liquor, for which the order blank was executed, and no cash was paid down. The photostat copy of a receipt signed by Mr. Files is for \$12,350, and covers the overage that he paid to Mr. Newman. I also recall similar transactions up in Sonoma County in which Primo Rocco acted as intermediary, along with Mr. Burnett. A friend of mine by the name of Miller introduced me to Burnett and I gave him my card, reading, "International Import Company." He said he was in the construction business and that he went around little towns up the State, and I told him if he knew anybody that needed any liquor to let me know and I would appreciate it. About a week later, he said that he had a friend in Santa Rosa who had some friends that needed some liquor, and I told him that he could go ahead and tell them to

(Testimony of Charles Malaby.)

deposit the overage, or give him the overage, and that he could bring the overage to me or I would go over and get it. I did not see him for four or five days, and then he came back and told me that there was a man there by the name of Rocco who had collected some money off of a friend, which money had been deposited with him for liquor. I told him I had no time then to go over to get the money, but that I would go in a couple of days. In a few days he took me over and I met Rocco, and told him the price was \$60. Rocco said he had told his friend it would only be \$57, and I told him to let it go at that. Then Rocco gave me the money that had been paid for the difference, and I took the money and came back. Later, when the whisky was coming in, I met Burnett and I told him to go to the Palace Hotel and we would give him the order. He went to the Palace Hotel and Mr. Nathan Newman and I wrote up the order, and Newman asked me to go over to Santa Rosa, to Boyes Springs, and other places, and collect the money for the ceiling. I told him I had no time, and [164] that I would give it to Burnett, and that he would do that. So we wrote up the orders and gave them to Burnett and he took them over and brought back the ceiling checks (496). Exhibits 15, 16, and 17 for Identification are the documents—except the receipt on the first one, which I turned over to Burnett to take to Sonoma County to have executed. They were made up at the Palace Hotel by Nate Newman. After

(Testimony of Charles Malaby.)

the Williams' and Goldstein's transactions I went to Los Angeles and it was then the defendant Bert Cain came into the picture (497), and I got my connection with the International Import Company. I made another trip to Los Angeles. I used to go down there every couple of weeks in connection with the operations we were in, and to visit. On those occasions I talked with Cain about the business; and on different occasions we discussed the different amounts of overage that had been collected. Once we talked about the disposition of the moneys with regard to the cost of the car of liquor which was being purchased in the east. Cain and I were present. He said the car cost \$72,000, but the ceiling price, I think, was around \$44,000 or \$45,000. The money to pay for that car came from the overage we had been charging these people. When Nathan Newman and his brother and I went into the deal, in the first place, the financial condition of the three of us was not good. We did not have enough money between us, or property, to buy a carload of whisky. Mr. Cain told me that his financial condition was not very good (500). He did not give me any statement of finances or anything of that sort. He said it cost him some money to buy the license, and he hadn't any more money left, hardly. The franchise cost \$2,500, and it was paid to the Midvalley Distillery, and the money came from the sales I made of whisky; from the overage (501). I recall a transaction with a man named Di Silva. It was made through Lowen-

(Testimony of Charles Malaby.)

thal [165] who collected the money, and I went to his house to check up with it, and he told me about it and gave me the money. Subsequently I caused the invoice and the receipt, shown as Government's Exhibit 25-A for Identification, to be made up. Newman and I collected the ceiling. Di Silva did not have any receipt for the cash payment. Lowenthal collected the cash himself, and turned it over to me. It was not very much; it was for only 8 cases. I remember a transaction with Amaro Pitta whom I first met in San Francisco and we talked about liquor. He said he was interested in buying 100 cases of bonded liquor, so I brought him over to Files' office and he deposited \$3200. Government's Exhibit 14-A is the sales slip that was executed at the time. Later he ordered 25 cases of McHenry Reserve, and Government's Exhibit 14 for Identification was executed at that time. The first transaction was for 100 cases of McHenry Bourbon, 100-proof. We had been promised whisky of that type, too. The overage was \$3200. Exhibit 14-B for Identification is a note signed by Files and Shaeffer, but I do not know anything about the circumstances of the execution of that note. I was present at the time Pitta paid the deposit at Files' office. Exhibit 14-D for Identification was executed at that time and given to him. I remember the transaction with Margaret McNeil (503). A friend of mine called me one day and said that he was in a place called the Big Boy Barbecue, and in there that

(Testimony of Charles Malaby.)

Mrs. McNiel had said that she needed some whisky; and had already given an order for it. I asked for the woman's name and phone number and address, and I called her up and she told me she had given the order to Oscar Lowenthal, who said he represented me. She said she had given an order for 200 cases. So I went over to see Lowenthal, and he told me he took the order. I told him that she claimed that she had [166] given him \$5300, and he told me she had. I asked him where the money was, and he told me he had it in a safe deposit box. When I asked him why he did not turn it over to me, he said that she had told him not to. So I asked him to go over and see her with me, and we went over together, and when I asked her if she had told this man not to turn the money over to me, she said she had not, and so told him, and wanted him to turn it over. He then said that that was not true, and that she had told him not to turn it over, and they argued back and forth. Finally she said that she wanted her money back. So Lowenthal and I left, and he said that she said not to turn the money over to me, and that that was why he had not turned it over to me, and that he was not going to turn it over. So I had a long talk with him, and finally I called Mr. Newman, and Newman said that he would come down. That was Nate Newman. I had called him at Los Angeles. Newman came to San Francisco, and we met with Lowenthal, who said that he would pay over the money but he did not have

(Testimony of Charles Malaby.)

it all at that time. The next day Newman and Lowenthal met, and I believe Lowenthal gave Newman some money, but I do not recall exactly how much. Lowenthal said that he would go out in the country where he was interested in a show and get some more money. So we drove out that evening—that is, Newman, Lowenthal, and I. Out in the country Lowenthal collected \$500 from the show and turned it over to Newman; and that is all I know about the transaction. The money was never turned back to Mrs. McNeil. We got the order of 200 cases and delivered to her 50 cases. Government's Exhibit 8 for Identification is the invoice connected with that transaction. Mr. Cain had been up to San Francisco a couple or maybe three times, up to the time of the McNeil transaction. I do not remember the months when he was in San Francisco, but he was here one time when [167] Cardinelli came up there to the Palace Hotel. I do not recall the date. Cain was not at the Palace Hotel when Burnett was there and got those slips. I recall the transaction with Nello Nomellini (505) and Luigi Di Ricco. I engineered that and took that order and took it down to Files and there deposited the money. I do not recall what they deposited with Files. They refused to take McHenry whisky and I switched it to somebody else. Newman and I went to collect the ceiling, as shown on Government's Exhibit 12 and 12-A for Identification. I had theretofore collected the cash for the overage. It was deposited

(Testimony of Charles Malaby.)

with Mr. Files while I was there. They had a receipt for it, and when we went to get the check for the ceiling we always asked them for the receipt, and we got the receipt back. The moneys deposited with Files under the escrow agreement did not remain in his office at all. As soon as the customer walked out, he was supposed to turn it over, and did so. Sargiani (507) had an order for 50 cases and then he changed his mind. He said he had a chance to buy other whisky, and wanted his money back, which was the overage. He deposited his money with Files with two other gentlemen.

(At this point U. S. Exhibit 30 for Identification was marked.)

(Witness continuing:)

I remember a transaction with a man named Cardinelli (507). I was in Richmond and met a friend of Cardinelli's who told me that Cardinelli might need some liquor, so I left my card. I heard nothing from him for about a week. Later Cardinelli called me and I met him at the Sutter Hotel, in San Francisco, and he gave me two or three orders, one from Pittsburg and a couple from Richmond. He said he had the money for the overage there, and he gave me around \$5000, or more. I gave him a [168] receipt for it, and then when the liquor was coming he wanted the invoices so he could give them to these people. I told him to come over, as Mr. Newman was there. He came

(Testimony of Charles Malaby.)

over and we went to the Palace Hotel. I told him that Mr. Newman and Mr. Cain were in the city now, and that I would introduce him to them, and that Newman would make out the invoices. Then I brought him upstairs and Newman made out the invoices, and after he had made them Newman asked me, "How about the other money?" and I said, "I got it all right." When we had this conversation about the other money, or the overage, Cain was in the room, not very far away; maybe four, or five, or six feet—something like that. I walked out with Cardinelli and I did not go back, so I do not know how long Cain stayed there. He was supposed to be rooming at the Palace. He stayed in the city a couple of days. On that trip I discussed with him the progress of my affairs, and told him how well we were doing, and everything was lovely. Nothing was said about any overage collections that had been sent down to the firm. On another occasion, Newman, Cain, and I were at the Palace, but I cannot fix the exact date (509). I think it was about the time of the Kusalo, Porfido, and Bryden (510) transactions. I had made certain collections and had some money with me. Newman and I had crossed the bay and we signed up three or four orders, including Figone and Bryden; and I think we had the money with us then. We came back quite late and went upstairs, and Newman said that we ought to split the money. We collected about \$2500 overage money, and I told Newman that I had spent about

(Testimony of Charles Malaby.)

\$1100 buying a few cases of liquor for those customers, and I wanted to take that out, and he said, "All right, take it out." So it left \$1500. He gave Cain \$500, and me \$500, and kept \$500. The two checks from Kusalo, dated 5/25/44, one check for \$691, and the other [169] one a check to the International Import Company for \$868, are marked Exhibits 11, 20 and 20-A for Identification. That is the date of the transaction. Kusalo had already cashed his own check and given us the cash. On that same day Newman and I were collecting the ceiling. We had gone to collect the ceiling from de Georgis, and he had told us about these two other people. We went to those two places, and collected the ceiling and the overage at the same time. That is the date when the three of us were at the Palace Hotel, on May 25, and the date when we split the \$1500 up into three equal parts of \$500 apiece. Government's Exhibit 18 for Identification are the papers dated May 23, 1944, executed in connection with the Elliot Smith transaction, on account of whisky to be delivered. It must have been a month or two, maybe more, before this date that we had collected the overage. April 8 is the date that I wrote the order, when I was taken there by Lowenthal. I collected the cash overage at that time, on April 8. At that time I received \$1480.50 (515). Newman was not there at the time. He was there with me when we collected the ceiling.

(At this point Government's Exhibit 18-B

(Testimony of Charles Malaby.)

for Identification, an order blank with the heading "International Import Company" identified by the witness, was marked.)

(Witness continuing:)

I recall a transaction with Martin Fuchslin, originally contacted by McKinnon. Government's Exhibit 2 for Identification is the paper which was supposed to have been executed by McKinnon, and the first paper is dated May 9, 1944. The other papers bear the date 5/23/44, and I executed them myself. Newman and I went there and we got the check for the ceiling and we asked him for the receipt that he had for the money, and he gave it to us. This covered the overage. I recall a [170] transaction with Nomelini (517). I made the first contact. I took them down to Files' office and they deposited their money and got a receipt for it. Files was there and his secretary, although she was not there when the money was deposited. She was outside. Because, when they deposited their money they went into a private office. At that time I secured these documents, Government's Exhibit 12 and 12-A, which cover the ceiling transaction. I remember the Manuel Costa transaction. I contacted old man Costa and he ordered 50 cases, and gave me a check for it. A few days later Newman was in San Francisco and we went out there. The check which he gave me was for the ceiling. When Newman and I went there the liquor was pretty near Los Angeles and we went out there to collect.

(Testimony of Charles Malaby.)

We stopped to see Costa and his son was there and he gave us another order for 50 cases of McHenry Reserve, and gave us a check for the ceiling and the overage in cash. Government's Exhibit 13 for Identification refers to the second order. I recall a transaction with Pitta (519). I was introduced to him in San Francisco and he said he needed 100 cases of bonded liquor and I told him I could supply him with it, and made an arrangement and took him down to Files' office, and he deposited \$3200. I do not know whether Files was there at the time or not. Exhibit 14-B for Identification is the receipt given for the payment of the overage; and the other document, Government's Exhibit 14-A is for the order of 100 cases. Later there was an order for 25 cases. I do not know anything about Government's Exhibit 14-C which is a note. In the transactions that were had with Lichtenberg and Johnson and Perretti I have already identified the order blanks, and said that I had given those order blanks to Burnett with my signature already on them, and that Burnett handled the transactions. I have also [171] identified the McNeil transaction, and the one that I had with Vincentini, in Stockton (521). At the beginning, Benson handled the Frank Spenger transaction, and introduced me to Spenger; and I went out there and made a deal. An order for 500 cases was given and we came over to Files' office. Spenger deposited a check with Files, but Files did not want to cash the check and asked me if I would cash it. I took the check to Mrs. Schilling

(Testimony of Charles Malaby.)

and asked if she would cash it for me. She put it through her bank, and two or three days later she met me and gave me the cash, and I took the cash to Files. He took his 5 per cent and I kept the balance (521). Government's Exhibit 4-A, the check, is the one I was discussing. It bears the signature of Mrs. Schilling, who cashed it. The balance, after Files took his 5 per cent, I took to Los Angeles that night or the day after. At that time I forgot the order of Spenger, and I asked Benson to go out and get that order and send it to Los Angeles to the office, because I was in a hurry. Benson did so, and he put it in a letter and sent it to Mr. Cain. It is an order for the liquor; for the 500 cases. Government's Exhibit 4 for Identification is the order.

Mr. Licking: Q. Did you give Mr. Benson any directions?

A. Yes. I said, "You get that order from"—

Mr. Ames: I will object to that, if your Honor please, as not binding on any of these defendants. It is hearsay.

Mr. Licking: If the Court please, this is a direction to a co-conspirator. (523) * * *

The Court: * * * The objection will be overruled. Proceed. (523)

Mr. Ames: Exception to the ruling. (524)

I told Benson that I had forgotten to get the order from Spenger and I left it over there and I asked him to go and get [172] it, and to mail it to the office, to Mr. Cain. And Benson put it in

(Testimony of Charles Malaby.)

a letter and sent it down there, to Los Angeles, where I was when the letter arrived. Mr. Cain opened the letter and read it and asked, "What does Benson have to do with this deal?" I told him—nothing, but that he simply helped me out on it. There was a letter of transmittal with the blank that came down to Cain at that time, and the letter written on the Hotel Stanford stationery is that letter. I was not present when the letter was received in Los Angeles. I came in afterward; and the letter was discussed between Cain and me, in the offices of the International Import Company, about May 3. Nate Newman was there. Maybe Morrie Newman was there, too, but I am not sure. Cain said that he got a letter from Benson this morning and an order for 500 cases, and asked what Benson had to do with the 500 case order. I told him he had nothing to do with it, that he just helped me out, and he introduced me to Spenger. And I said, "That is the order that got the money in." I am certain that I discussed that with Mr. Cain and Mr. Newman. I am sure that they knew it was an overage payment that had been collected.

(At this point the document—letter—was marked U. S. Exhibit 4-B for Identification, and attached to other Exhibits bearing No. 4.)

(Witness continuing:)

There was a transaction with Robert Thomason

(Testimony of Charles Malaby.)
which is reflected in Government's Exhibit 7-A and 7 for Identification, and dated April 4.

(At this point, U. S. Exhibit 7-B for Identification was marked.)

Cross Examination

By Mr. Ames:

I live at 805 Bush Street in San Francisco with my wife. [173] When I am in Los Angeles I live in different hotels; sometimes my wife is with me and sometimes she is not. My wife's name is not Selma. Selma Malaby registered as Mrs. Malaby, but I never lived there. I used to go there, where she used to live. I did not live with Selma Malaby as man and wife when I was in Los Angeles, at her place of residence. In January and February, 1944, I lived at 1232 Maryland Street, Los Angeles (529). The conspiracy about which I have testified started about that time in San Francisco. I stopped at different Hotels in San Francisco. Most of the time my wife was with me. I was at the Victoria Hotel at the time I was picked up and booked as a thousand-dollar vag (529). I was at the Fairmont Hotel and an officer came up and took me and Mr. Nate Newman down, and we were booked, and we were released in three hours. I was convicted of felony in 1928. It was for receiving stolen property, and I got five years probation. In June, 1932, the same charge of receiving stolen property was brought up, and I was convicted and went to San Quentin. That is the Judge revoked

(Testimony of Charles Malaby.)

my probation. I was working for the Police Department, and he said that I had no business to mix with other people and he revoked my probation, and sentenced me as prescribed by law on the original charge, of 1928. I was held one day as a witness in Portland and happened to be in a place where there was a fight, and they took two or three people, including me. There was nothing serious, and nothing to amount to. I do not recall at all that I was found guilty with a thirty days suspended sentence in Portland, on January 17, 1935 (532). I have been arrested in Los Angeles once or twice. I was held as a witness for two days. I was a whisky salesman up until this trouble came, in July, 1944. Since that time I have not done very much. I have been waiting to collect my commission, and so [174] far waiting for that car of whisky to come in. I was waiting to collect my commission from Mr. Cain, the International Import Company, who I claim owes me a commission at this time. I think it amounts to about 5 per cent on \$140,000. I have not done much since July, 1944, although I try to do a few things to make a living, such as mining and different things, or selling a mine, or doing something. I have been trying to sell liquor. I have been trying to do it in the same way as I had been doing it before July. Since July I have not been collecting overages of the same sort I did prior to that. I have not collected some \$25,000 on a liquor sale as late as December. I do not know that there is a war-

(Testimony of Charles Malaby.)

rant out for my arrest on grand theft from Los Angeles County in connection with any such transaction. I never did collect about \$25,000 on liquor transactions in the same fashion that I have testified to in this case; and I did not pay back all but \$8,000 of it. Prior to going into this whisky business I was handling mining, selling real estate, and trying to do anything I could to make a living. I was never employed by anybody, only by the Police Department and the sheriff's office. I was under-cover agent for about ten years or more in Los Angeles, and I worked for the sheriff's office for two years as under-cover agent, and I was paid for it. I first met the Newmans around the first part of last year, but I had not known them before. I met them through their sister, Selma, when I was working on a certain real estate transaction. My financial condition was not very good then. The Newmans and I figured to make a business out of collecting money and later delivering whisky. Mr. Newman was to go east and make a connection to get whisky from a distillery, or wherever he could buy it; but he did not say what connection, nor with what distillery. At no time did we have [175] any connection with a distillery called Midvale Distillery. (536) I never did collect anything from Williams or Goldstein, but Newman did, and the money was deposited with Files and was turned over. Files paid the money to Williams. Newman had given him the money, which money Newman

(Testimony of Charles Malaby.)

had received from me, and Files paid it back. I paid him back \$1235 which I had received from other sales that I made, although I do not recall right now whom I had sold. When I had to put up money for another man, I went and made another sale and collected more money, and turned that over; and the \$1235 in money that I paid back to Williams, I collected from somebody else. I didn't keep hardly any money out except my expense, of say \$50 or \$100 a week, or whatever I needed. Whatever the Newmans allowed me to keep, I kept; and if they allowed me \$100, I kept \$100; if they allowed me \$50, I kept \$50; and the only money I got was what the Newmans chose to dole out to me. I never at any time got any other money than that. As soon as the money was collected, Files delivered it to Newman. I did not receive any of the money from Files until about two or three transactions. Nate Newman instructed him that if he was not here, to turn the money over to me. That was three or four months afterwards. I got \$10,000 of the Spenger money and took it to Los Angeles, less the 5 per cent that Files got. After I got to Los Angeles I gave that money to Newman, and he told me he was going to take it to the office the next morning. I never saw the money again. When I took the Goldstein money Morrie Newman said he could get Doggerty whisky from Philadelphia, or some place. Doggerty whisky was never shipped from the east to California to fill that order. Morrie Newman said he

(Testimony of Charles Malaby.)

could get the whisky, and asked me to take the Goldstein order, and U. S. [176] Exhibit 26 for Identification is that order. I did not spend all of my time up in San Francisco. I visited Los Angeles every week or two weeks. Later I delivered some Rocky Springs whisky that had been bought by the International Import Company and sent to Mr. Goldstein because he cancelled his order and they made a deal with him that they would send him 10 cases of some kind of whisky every week or give him his money back. I signed all orders that were taken here in San Francisco for the International Import Company, and they instructed me from the office to go and pick these ten cases up, and I went and got it. I did not collect the \$4500 from Goldstein. I did not have my hands on it. I was instructed from the office to pay him back. Cain and Newman instructed me. I do not recall when it was that Cain instructed me to pay Goldstein this money back. I was called from the office several times before the date on exhibit 26-A, because Goldstein had been bothering Cain all the time. Goldstein wanted his money back, so they told me to try to pay him his money back; that is, Nate Newman and Cain told me that. Cain told me this when I was in Los Angeles. Cain did not give me the money, but I got the money from different sales I made in San Francisco, as that is the only way that I could pay it back. The only money that the office gave was Caputo's \$5000 and \$1000 to Rocco. That was taken from money I had sent

(Testimony of Charles Malaby.)

down there, and which money was produced from overages from other customers. I gave it back to Goldstein, even though I had not received it because I was working for the Company and I had to take care of whatever they instructed me to do. The Company paid me 5 per cent commission for all of this. It was to be paid on every case of liquor, as soon as it was paid for. I was [177] supposed to get my 5 per cent immediately after the order had been taken, and the money had been delivered; but I did not take it out. Defendants' Exhibit D is the arrangement that was made afterwards.

(At this point Defendants' Exhibit D was offered and received in evidence.)

Defendants' Exhibit D reads as follows:

"I, Charles Malaby, hereby agree to work for you as a salesman selling whisky on a 5 percent commission of the OPA ceiling price to the dealer, payable at the time you have received full payment in cash from said dealer, and said merchandise so sold has been delivered to you in Los Angeles, California, by the distiller whose merchandise I have sold for you."

The next paragraph has no bearing here. The last paragraph:

"I also agree to obey any and all Federal, State, and listed rules and regulations covering the sale of liquor by wholesalers and importers."

(Testimony of Charles Malaby.)

Signed, "Charles Malaby," and "Accepted by the International Import Company." (544)

(Witness continuing:)

I signed that and agreed to its terms. I had a letter from Cain around July 18, asking me to resign. I was not fired. I was asked to resign on July 18, I believe. I do not have that letter, but I can produce it. Prior to that, he called me into his office and told me it was going to look very bad if I stayed working for the office and said that he thought I had better write a letter so that he could have it on record to show the law that I meant all right. He knew I was collecting overages all the time. I left the International Import Company in July, [178] around the 18th (545). I was with the Company from March 22 to July 18. When the newspaper in San Francisco broke about this trouble, I was in Los Angeles, and had several conferences with Cain every day. I cannot remember when I had the first conference with Cain. At one of these conferences, Cain did not tell me that he did not want anyone around the place who was violating the OPA regulations. We had a meeting one day, and he said that the ATU was checking up and it was going to look bad for him, and that we had to keep him in the clear; and it would be better if he wrote me a letter and asked me to resign until this trouble was over. First, we told him we would not resign; and then later I told him it would be all right to go ahead and write such a letter. I imagine this was around in July, because

(Testimony of Charles Malaby.)

Mr. Cain went east at one time; but I do not recall the date (547). It was after Cain returned from the east. The money that was collected from Williams and Goldstein was kept to buy whisky for the International Import Company. It was kept by Nate Newman but I do not know where. At that time the two Newmans and I were looking for a wholesaler because we had to have a wholesaler to put the whisky through. In the meantime, about \$16,500 was collected in a transaction that was consummated by Nate Newman. I did not have any connection with Midvale Distillery, myself, except that I wired \$2600 to Harry Hornstein (548) who was a connection man for the Midvalley Distillery. I was told from the Los Angeles office to wire the \$2600, and I did wire it from San Francisco. I got the money from a sale I made; from an overage that I had collected from somebody else. That was done at the direction of the office in Los Angeles. I talked with Newman about it. Hornstein was the go-between. I was not [179] told what this \$2600 was for. I believe it was owed on borrowed money for overages they paid for the whisky, although I don't know. The purchasing agent, whoever bought the whisky back there, paid the overage. He was Morrie Newman. I could not prove that he paid any overage to the Midvale Distillery, but there was money supposed to be paid to the Midvalley. I was told in the presence of Mr. Cain and Mr. Nate Newman that they paid \$14 overage for that whisky. That was told to me on many occasions. I

(Testimony of Charles Malaby.)

told them that was too much, to try to reduce it a little bit, and they said that they might try to reduce it a couple of dollars. Nate Newman and all of us talked about that, but I do not recall the date. Every trip I made to Los Angeles I went to the office and we talked about something. I was told the \$14 a case overage was paid to the distillery. Nate Newman and Cain told me that that money was supposed to be paid. Cain said that he was paying too much overage. My story is that they were going to pay \$14 a case to Harry Hornstein overage to the distillery. Morrie was the one who negotiated the deal back there. I do not know the price of this whisky from the Midvale Distillery (552). I was told it was around \$21 or \$23 or something like that. Then they figured the freight and the tax. I talked with Cain and Nate Newman concerning the type of whisky. They said it was going to be blended whisky, and also told me they were going to have some bonded bourbon whisky, and rye. Cain and Nate Newman told me that. Morrie brought some labels with him. Cain said that they were going to have some bonded whisky, at the time Morrie came back and brought the labels with him. I think the ceiling on the bonded whisky was \$68. I understood the Importing Company was going to pay \$14 over the Distillery's ceiling, which was around \$21 or \$22. Then to this total price, there was to [180] be added 80c for freight, and \$1.92 for sales tax in California, which would bring it up to about \$39 a case, which was more than the ceiling; and in addition to that we were going to

(Testimony of Charles Malaby.)

sell it for \$57, \$60; and I was selling for \$63. I was told to disregard the ceiling price. I was also told that we would invoice them for the ceiling and get as much as we could for it. Cain told me that several times when he and I were alone in the back room in Los Angeles, but I could not say when it was. It was before he went east. I went to work for him on March 22. He did not go east until this trouble came up, I think. He went east to get whisky when the newspapers came out with all the trouble. This conversation that I last mentioned was between March 22 and the time when Mr. Cain went east. It was in Los Angeles. We were just talking about the prices and different things and he said I should sell, or get as much as I could for the whisky but not to go over \$60, if possible, because we did not want to make different prices to everybody; and he was going to try to charge everybody the same price, around \$60 (556). Cain did not have to give me any instructions, with reference to the handling of the cash because he knew the sales manager collected all the money and I turned all the money over to Mr. Newman. He gave me no instructions about that. I collected all of this money and turned it over to Newman; and that was the habit in every single transaction that I had (557). I turned everything over to Nate Newman except for a little bit of expense money, which amount was determined by myself and Mr. Newman. The only thing I was to get out of the

(Testimony of Charles Malaby.)

transaction was 5 percent as a commission, and half of what the Newmans got. They were supposed to get 50 percent of what Cain got. I was to get 5 percent from the International [181] Import Company and part of what the Newmans got because they were supposed to get 50 percent. The Newmans were to get half of the profits that the International Import Company made on the transactions. This was discussed by me, Cain, and Newman (559). I was to get 5 percent commission from the International Import Company on all of the sales that I made, and then I was to throw my 5 percent with their 50 percent; and then we were to split that three ways, between the two Newmans and myself. In other words, Nate Newman would get one-third, Morrie Newman would get one-third, and I would get one-third; and Cain would get the other half. We did not have a chance to figure anything because when I went to Los Angeles the last time this trouble came up and then there wasn't any money or any whisky. They had \$16,000, I believe, in the bank, or something like that. We sent \$5000 to Caputa; and we sent \$1000 to another man. There was other expense, and I don't know what there would be. I got \$650 myself while I was there (560). The overage was supposed to be included in figuring the profit. I never had anything in writing to the effect of the division of these profits. I had no receipts, no books of account, and no memorandum with reference to what I did (561). Cain handed me the letter of May 3, 1944 to read and I

(Testimony of Charles Malaby.)

read it (562) and put it in my pocket. It is marked 4-B for Identification. He also handed me two or three other letters from Mr. Benson. It is not a fact that I stole it from his desk before he ever saw it. I had it in my possession at the beginning of this trial. I did not steal it. I remember a conversation in the office of Mr. Mathes on January 13, 1945, when Cain and Mathes were there. I did not say that I had stolen this letter, but I said that I had a letter that Cain had given me. I did not at that conversation state [182] that I had taken the letter. At that conversation I told Cain and Mathes that Mr. Cain had given the letter to me. I do not remember the date that I was first arrested in connection with these transactions, but we were but we were arrested in the International Import Company office. Mr. Cain was there at the time that we were arrested. I believe it was in June. Mrs. Anderson was never present at any conference that I had with Cain. Mrs. Anderson was not always in the same room when I talked with Cain; but anything we wanted to talk over confidentially we always went in the back or upstairs. After I had been arrested I desired to hire an attorney, and I spoke to Mr. Cannon. I was first arrested on an information (567). Mr. Fuchslin swore to a complaint. At that time I did not have any conversation with Cain in which I demanded that he pay my attorney's fees; and I did not tell him that if I did not get the money I would put myself at the mercy of the Court and tell all that I knew and

(Testimony of Charles Malaby.)

ruin Mr. Cain. I never did make any such statement. I did ask Mr. Cain if he would be kind enough after all the hard work and all the money I turned in to the office, if he would help me hire a lawyer, and he said he would not. I did not threaten to testify against him (568). I did not in the middle of July, 1944, go to Cain's office, and in the room where Mrs. Anderson was present, state to him that I wanted him to pay Mr. Jake Ehrlich's fee and that if he did not do it I would go to the United States Attorney and tell him everything I knew. I asked Mr. Cain if he would hire an attorney for me, and Newman, and he said that he would come to San Francisco and speak to Ehrlich. He did come to San Francisco, and gave Ehrlich a letter, I believe, that he would pay him \$5000 after he sold his license; and after that he refused to pay the money. I am not angry [183] at him or anybody. I never threatened Mr. Cain; and I never insinuated I would go to the FBI or anybody else (569). I did not go to Mr. Cain's office in August and tell him I had collected over \$150,000 in black market money and that Mr. Cain knew nothing about it. I asked Cain what he was doing with all the money that he had received in that office. Cain did not ask me what I had done with all of this money. I never did tell Cain that he had never received a dime of black market money. During the month of September I did not call at the office and talk to Cain in the presence of Mrs. Anderson and threaten to do him harm, and to go to the Federal

(Testimony of Charles Malaby.)

authorities and tell everything I knew; and Cain did not tell me to go ahead. I have never threatened Mr. Cain, under any circumstances. I did not on October 17, 1944, go to Mr. Cain's office and admit that I had stolen a check from the Lake Inn Corporation for the sum of \$904.75, cashed it and put the money in my pocket. One time Nate Newman and I and Cain were present and Cain said that there was a man who had given an order and he had not received the check on it. I told him I had received the check and cashed it, to pay Goldstein and other people who had demanded their money; and I told him I had a right to cash it. Cain then said he could put me in jail for that. I admitted taking the money; but I had a right to receive money; my credentials show that. The check was made payable to International Import Company and I signed it "International Import Company by Charles Malaby". My credentials show that I have a right to receive money. Mr. Cain knew about these black market transactions. I never have told anybody that Cain did not know anything about these transactions. He did know about them; and he knew about them all of the time. He told me that he had to lay 50 cents aside for protection when that [184] liquor came. It is not true that he discharged me from the employ of the International Import Company as soon as he found out about the transactions. I do not know a Mr. Mathias (574) of Los Angeles. Mr. Mathias never gave me a dime at any time. I do not even

(Testimony of Charles Malaby.)

know the name. I know an attorney in Los Angeles named Charles Taylor, but that does not remind me of a Mr. Mathias. I did not tell him that I was going to get out of the trouble that I was in because I was going to blame it on others. I never made that statement to anybody. Before I took the stand to testify I did not have a conversation with the United States Attorney, or anybody representing him; although I did have a conversation with my attorney. No arrangement was made at any time regarding my testimony. My attorney told me the only thing I could do is to go in and plead guilty. I have not been promised probation nor immunity from a jail sentence; and I have no previous arrangement whatsoever with any representative of the United States Government, either directly or indirectly (576).

Cross Examination

By Mr. McGuire:

This arrangement regarding the sale of liquor which I have testified to was entered into not very long before I met Lowenthal; but it was before I knew him that it was first entered into. As part of the transaction I was to secure the services of certain salesmen. I secured the services of several, including Lowenthal and McKinnon. Navinger came into the picture quite a while after that (576); and I gave these salesmen certain instructions as to what they were to do. They knew what the ceiling was because I told them, and I told them a price to

(Testimony of Charles Malaby.)

charge from \$52.50 to \$55. The first price I quoted them was \$51. Later I told them to raise the price because Mr. Cain, the boss in Los Angeles, [185] said that he had to get a certain amount of money extra to pay certain protection, and we had to raise the price on liquor. I told that to Lowenthal. I did not write down any breakdown of the price. I had it written down, and he copied it, I believe. Under my instructions to them I was to close the deals myself, and sign up the contracts myself, and collect the money. Lowenthal did not go to work for me for about a month or six weeks after I first contacted him. I met him through a friend of mine. Lowenthal was supposed to get 5 percent. The salesmen were merely what might be called bird dogs. The salesmen were to get the connections. I did leave a few signed blanks with Lowenthal. All the salesmen were to do was to get the connections and turn them over to me, and I was to do the rest. He took me to the people on every occasion. The first deal he turned over to me was Robert Thomason, and Lowenthal and Thomason went to Files' office, but Files was not in his office when we came in and we waited. Finally I asked the girl to see if she could reach him on the phone; the girl did, and I talked to Files; and he told me I could sign the receipt myself. So I asked the girl to typewrite a receipt, and she did, and Mr. Thomason turned the money over to me. Lowenthal was sitting, waiting outside of the counter. I completed the transaction myself and collected the

(Testimony of Charles Malaby.)

money. I believe that Navinger told Lowenthal about the Elliot Smith deal, and Lowenthal and Navinger talked to him; and I think Navinger quoted the price (581). Lowenthal was present when the deal was closed. I met Lowenthal and Navinger there, and I talked with Smith, and signed the order, but he had all the money counted on the table; that is, the overage money (581). I do not recall how much it was, but I took the money. I think Lowenthal walked outside [186] at the time, but I do not recall exactly. He had nothing to do with the completion of the transaction, as it was between Navinger, Smith, and me. Both Navinger and Lowenthal received a little commission. I paid Lowenthal out of my own pocket. Lowenthal took the Di Silva deal. I had a blank signed and left it with him, and he went out and signed up for ten cases, I believe. Then I went to Lowenthal and he said he had the money for the ten cases, and he gave it to me (583). Exhibits 25-A and 25 for Identification are written wrong because we did not have any mixed whisky. It is not in my handwriting, and I do not know whose it is. I did not take any order for 10 cases of mixed whisky. I did not sell Di Silva some Rock Creek whisky. He was kicking about his order being late, so I went and bought two cases and took it to him to make him happy (583). At one time I turned the Rock Creek whisky over to Lowenthal and he delivered them for me, and collected the money for the two cases for me, and turned the money over to me. Later I signed

(Testimony of Charles Malaby.)

Di Silva for 10 cases of McHenry whisky. At or about the time of the McNeil transaction was made I was going to Los Angeles, and Lowenthal told me that he had a prospect for 200 cases. I left four blank contracts with him. They were signed in blank. I was gone a few days. The contracts which I had signed and left with Lowenthal were not for any particular order because I did not know anything about it. About two and one-half weeks later I discovered about the transaction. I had not seen Lowenthal. I discovered he had made that deal, and then I went over to see Mrs. McNeil alone the first time, and I asked her who she gave that order to and she said Lowenthal; and I asked her if she had given Lowenthal any money, and she said she had given him \$5300. She showed me the order that Lowenthal [187] had given her, and the receipt for the money. I did not pick up those papers at the time, but I saw Lowenthal and asked him about that order, and if she had given him any money, and he said that she had. He told me he had it in his safe deposit box, and had not turned it over to me because she told him not to give it to me. We got in the car and went over to see her, and I asked her if she had told him to turn the money over to our office, and she said that she had not so told him, but wanted him to turn the money over to our office. Then she said she wanted her money back, and Lowenthal said that he would get the money and would see Mr. Malaby tomorrow. We picked up those contracts a long time after that, when the

(Testimony of Charles Malaby.)

whisky came in, and when we were going to deliver 50 cases to her. We wrote up a new invoice. Newman and I were there. Lowenthal had nothing to do with that transaction, for the 50 cases. The receipt and the contract were turned over to the office. Later Nate Newman came to San Francisco and I told him about the transaction, and I took him to Lowenthal's home, and Lowenthal said the money was in the safe deposit vault, but that he did not have all of the money. He turned over some money to Nate Newman. I did not give McKinnon the same instructions I gave Lowenthal. I charged him \$1 more (589).

Cross Examination

By Mr. McDonald:

All of the transactions with Mr. Files were conducted by Nate Newman, but the escrow matter was consummated by Nate Newman.

Cross Examination

By Mr. Cannon:

Mr. Cannon: I was going to ask a couple of questions very briefly.

Q. Mr. Malaby, in this indictment it is charged that you people are engaged in the scheme of this conspiracy to [188] commit violations of the law and performed two overt acts. I am going to read them to you. There are first two overt acts, and I am going to ask you if you can tell me the circumstances of those. The first overt act is: "On or about March 10, 1944, the defendants Nathan New-

(Testimony of Charles Malaby.)

man, Charles Malaby, R. H. Shaeffer, and Walter O. Files met together at 309 Kearney Street, San Francisco, California.” Can you tell me what the occasion of that meeting was? I have no objection, if Mr. Licking has the information from the gentleman who was on the stand the other day, Mr. Williams, refreshing Mr. Malaby’s recollection. We were going to get that from the bank account.

Mr. Licking: Yes.

Mr. Cannon: Q. Was that in connection with the Williams transaction, do you know?

A. I think it was. (591)

* * * *

Mr. Cannon: Q. Let me ask you this question, then, Mr. Malaby: Do you remember any occasion on or about March 10, 1944, when Nathan Newman, Charles Malaby, R. H. Shaeffer and Walter O. Files met together at 309 Kearney Street, San Francisco?

A. I don’t recall the exact date, Mr. Cannon. We have met several times and talked, but I don’t remember that particular date.

Q. I am not trying to confuse you. I just want to get the date fixed. A. I know.

Q. But in any event, you four did meet on or about the date of the opening of the escrow regarding a Mr. Williams, is that correct?

A. That was long before that.

Q. Not earlier than March 10, was it?

A. It could be March 10; it could be around that. I don’t recall the exact date.

(Testimony of Charles Malaby.)

Q. You do not recall any——

A. I think the Williams [189] deal was before that, long before that.

Q. Then the second overt act, to which you said you pleaded guilty, was on or about March 11, 1944—that is the day after—on or about March 11, 1944 the defendants Charles Malaby.

Mr. Licking: Counsel, pardon me. I don't like interrupting you, but we will just save a little time. Leave the overt acts except the last one. I have to prove one of them only. There is one of them proved. This Navinger transaction is proved beyond all doubt as to dates and everything. Just leave the rest of them for the purpose of your case.

Mr. Cannon: I do not know the purposes of the case.

Mr. Licking: All right, I will abandon them for purposes of my case.

Mr. Cannon: Let that be understood, then. Counsel abandons all the overt acts except the last one alleged.

Mr. McDonald: I did not hear Mr. Licking's reply.

Mr. Licking: Yes. (591-592)

(Witness continuing:)

I do not think Mr. Newman met Mr. Lowenthal until a little before the McNeil deal. Referring to the overt act in the indictment, that “on or about March 11, 1944, the defendants Charles Malaby, Nathan Newman, and Oscar Lowenthal met to-

(Testimony of Charles Malaby.)

gether in the city of San Francisco," as I remember the only meeting was long before the McNeil deal as shown on Exhibit 8 for Identification, dated May 23, 1944. The order was taken a couple of weeks before I knew anything about it; and then when I did find out about it, Newman did not come down to San Francisco for a couple or three days after that. The only meeting that Newman, Lowenthal, and I had on or about March 11 was on the McNeil transaction, and my estimate was that it was two weeks prior to May 23. [190] It is my best recollection that it was sometime in March (594). I think I did introduce Lowenthal to Newman some time about March 11, 1944, but I am not sure.

Cross Examination

By Mr. Gillen:

I recall telling Mr. Cannon on his cross examination, with respect to the first overt act contained in the indictment, that I, Nathan Newman, Files, and Shaeffer met in Shaeffer's office on or about March 10, 1944. What I meant by saying that we had several meetings, that we used to meet right along after that and say "hello, how are you?" because we knew Files and Shaeffer. I did not mean that we had any special meetings. During the early part of the year and while these transactions were going on, I remember that Shaeffer told me that he was farming peas in Mendocino County (596). I recall that I contacted Shaeffer first and told him that I wanted to get a wholesaler because I was bringing

(Testimony of Charles Malaby.)

some whisky out from the east. Shaeffer told me that Files had a relative by marriage who was employed by the Schenley people, and that he would introduce me to Files, and that I might be able to get a connection through that relative. That was done merely as a matter of personal courtesy to me. Subsequently Newman and I negotiated with some official of the Schenley Company whom we met through Files' relative. We negotiated with this official for more than a couple of weeks. The man's name was Schrader who was district distributor for the Schenley Company. At that time we were seeking the Schenley Company or any other legitimate distributor to handle our products; and we became discouraged when we were not able to get a distributor, and asked Shaeffer if he could get somebody who could handle the escrow transactions for us. Shaeffer told us that he would see if Files would handle an escrow transaction for us. [191]

Redirect Examination

By Mr. Licking:

The nature of the transactions and the course of the money that was to be deposited in escrow had been explained to Shaeffer. I had a conversation with him in this connection the first time we came to San Francisco to look for a wholesaler. I had known Shaeffer for many years and was alone when I saw him at his office on Market Street. It was prior to March 22, 1944, when I had this first conversation with Shaeffer—I believe it was in January. At that time I and Newman had developed a plan of opera-

(Testimony of Charles Malaby.)

tions between ourselves. We had just started it. The plan which Newman and I had devised prior to that was to sell whisky over the ceiling price. All I told Shaeffer at that time was that I wished he would help me to get a wholesaler; and I told him I wanted him to come up and meet the two Newmans, Morrie and Nate, at the St. Francis Hotel, and I introduced him there to Nate and Morrie Newman. I do not recall that there was any discussion at that time about the plan of operations (602). Shaeffer came up there himself several times when I was not there. I believe I did say something to Shaeffer about our plan of operations after we were arrested at the Fairmont Hotel, but I am not positive. That was after the Williams transaction (602). It was after we had gotten Files to act in the matter that I discussed this plan with Shaeffer.

Q. I call your attention to your testimony here, referring now to page 60:

“Q. Mr. Williams mentioned the necessity for some escrow holder, some one to hold the money?”

“A. Yes, he did.

“Q. What did you next do?”

“A. I went to my friend Mr. Shaeffer and asked him if he knew, can he get me [192] to someone who can escrow this money, and he said he would speak to Mr. Files.”

A. That is right.

Q. At that time did you tell Mr. Shaeffer what this money was?

(Testimony of Charles Malaby.)

A. No, I didn't, because he told me at that time that Mr. Files didn't want to know anything about whisky.

Q. What was it Mr. Files didn't want to know about?

A. He didn't want to know about any illegal transaction. All he wants to give is a receipt for the money.

Q. He didn't want to know about it, or he didn't want to make any record of it? Which was it?

A. Well, he didn't want to make any record of it either.

Q. I am asking you about your conversation with Mr. Shaeffer, not about your conversation with Mr. Files. Did Mr. Shaeffer know what this money was that you were seeking to have deposited? Did he know that that was overage that you had collected?

Mr. Gillen: Just a moment. Objected to as calling for his opinion and conclusions of what Mr. Shaeffer did.

The Court: If he knows he may answer.

A. I don't know whether he knew at that time or not, Mr. Licking. (603)

(Witness continuing:)

We never had any agreement with Shaeffer as to the amount of commission he was to receive. The agreement was between Newman and Files. I do not know what arrangements were made between Files and Shaeffer. I had no arrangement with

(Testimony of Charles Malaby.)

Shaeffer at all for any commission. Subsequently, I was present on several occasions when money was deposited in Files' office, and Shaeffer walked in and out. He went in there to tell Files something, and then he walked out again. At one time Files was away and Shaeffer accepted the money [193] and gave the man a receipt for it, signed by Files (604). That was the Pitta transaction shown on Government's Exhibit 14 for Identification. The receipt was signed by Files and the transaction handled by Shaeffer. I brought Mr. Pitta in, and he deposited \$3200. Files wasn't at the office at that time. Shaeffer was there and he took this gentleman to the office, and Shaeffer said that he had a receipt signed by Files and gave it to him as receipt for \$3200. Shaeffer then took the cash. That money was later turned over by Files to Newman. I did not discuss with Shaeffer the plan of operations until this trouble started; that is, until the arrest at the Fairmont Hotel. At that time there wasn't any whisky delivered. We were only taking orders. That was six or seven months ago, and that was after March 22 when I had received the letter from Cain. The arrest at the Fairmont was made February 14, 1944. Newman and I were both arrested in Newman's room, and were held about three hours and released. It was after that arrest that I had my first discussion with Shaeffer concerning the plan of operation, although we had talked before that time, but he did not know about the overage and all that till a long time after that

(Testimony of Charles Malaby.)

arrest. I believe he first knew about it when I got my credentials in March, after the Williams transaction. I might have discussed the overage and all of that with Shaeffer a day, or two, or three after I got my credentials, after I had come back to San Francisco from Los Angeles. We were alone and I think we were having a sandwich or something across the street from the office on Kearny Street.

Mr. Licking: Referring to the testimony of Williams, it is stipulated that with reference to certain payments he would testify as follows, namely, that the amount of \$10,255 was paid by him in the transaction and which he deposited on [194] February 3, 1944. That was returned to him in the amount of \$1135 on April 7th, and on May 14th an additional amount of \$5500 was returned.

Mr. Cannon: So stipulated. His testimony is slightly different than the way it turned out. He claimed he deposited the money, that he deposited the money on a certain date; the sixtieth day thereafter he demanded the return of his money. Apparently he didn't get his money back until May.

Mr. Licking: Well, February, March, April that would be—from February 3rd to April 7th when he got it back.—

The Witness: It was a ninety-day receipt.

Mr. Cannon: I think perhaps it is right. He got part of it back April 7th, \$1135, and on May 14th—

The Witness: I paid him that in cash.

Mr. Cannon: He got back \$5500. (608-609)

(Testimony of Charles Malaby.)

(Witness continuing:)

I think the first time that I ever mentioned anything to Shaeffer about overage and all of that was the latter part of March while we were having a sandwich. Shaeffer said Files was getting uneasy, or something like that, about this money; and I told Shaeffer that all of this money was overage money, but did not think we would have any trouble, something like that. Shaeffer and I were alone (610). The first money that was ever paid back was that of Mr. Williams; ninety days after the money was deposited, Williams made the demand on Files and Files stalled him for about a week until Newman came down. I was here. Files said he wanted us to get him that money so he could give it to Williams.

Q. At that time can you state whether or not, of your own knowledge, Mr. Files knew the nature of the transaction, knew what the money had been for? A. Yes, I believe he did.

Mr. McDonald: I move that be stricken. [195]

The Witness: Yes, he did. He did.

Mr. McDonald: I object to that as calling for a conclusion of the witness.

Mr. Licking: Q. Well, had it been discussed by you and Mr. Newman and Mr. Files, the nature of this payment, and what it was for?

A. Mr. Newman was the one who made the original deal with Mr. Files. Whether he told him about it at that time, or not, I don't know, but later on——

Mr. McDonald: I ask it to go out.

(Testimony of Charles Malaby.)

Mr. Licking: He said, "But later on."

The Witness: May I answer?

Mr. Licking: Yes.

A. Later on we talked about it; that is maybe a month, maybe three or four weeks after that; maybe two months after that.

Q. You do know the whole nature of the transaction was discussed by yourself, Mr. Newman, and Mr. Files? A. Oh, yes.

Q. So, there is no doubt in your mind that he knew what was going on? A. No.

Mr. McDonald: I would like the foundation laid for that discussion.

Mr. Licking: Q. Was it discussed on more than one occasion?

A. Well, every time someone made a demand for his money naturally we talked about it. (611-612)

(Witness continuing:)

The first one of the occasions when anyone demanded his money back was Williams. And that resulted in the first payment of \$1135 which I paid to Williams in cash on April 7. I made a sale and gave the money to Nate Newman, and Nate Newman took it to Files. Then I made another sale, and another one, until we had \$10,500, the full amount. That money was not put through the same escrow with Files, but was taken directly by me and did not go through the escrow. Files did not escrow [196] very many; maybe five or six, because any time the people gave us the money directly, I did

(Testimony of Charles Malaby.)

not take it to Mr. Files, because I wanted to save that 5 percent for the office. The date of the check on the Spenger transaction was April 24. Mr. Files knew what that money was for and collected his commission on that amount. It was on April 24 that I went to Spenger's place and brought Spenger over to Files' office. Benson was with me and Files deposited his check. Files gave the receipt and Spenger went across the bay and after Spenger had left, Files said he did not want to cash the check and asked me if I could cash it. I said I would try. I took the check to Mrs. Schilling and asked her if she would cash it for me, and she did, and gave me the cash and I took it down to Files' office (614) and turned it over to him. He figured his commission and turned the balance over to me.

Recross Examination

By Mr. Gillen:

When it came to my attention that in the course of pursuing this business we had to have an escrow holder, I went to Shaeffer to see if he, with his acquaintance in San Francisco, could recommend someone. He said he would talk to Files. Later he told me that Files would handle the escrow transaction but that he did not want anything mentioned in his office about whisky because Mrs. Files, with whom Files was having strained relations and there was a divorce pending, was employed in the office, and she had a very great dislike for liquor and the liquor business. I believe it was after I received my

(Testimony of Charles Malaby.)

credentials from the International Import Company that I first mentioned the word "overage" to Shaeffer. It could have been before, but I think it was after. I received my credentials on March 26, as shown by Government's Exhibit 22-A. I got them when I was personally present in Los Angeles; then [197] I returned to San Francisco and it was some-time after that that I was having a sandwich with Shaeffer and related to him what I have said here. At that time I told him I did not think we were going to have any trouble, and said that I believed Mr. Cain was going to take care of things all right; but I did not go into any detail, and merely used the word "overage." (616)

Recross Examination

By Mr. McDonald:

That is the first time that I mentioned "overage" to Shaeffer. I did not speak to Files about "overage" at all until after several transactions when people started coming in and asking for their money back. It was after I first spoke to Shaeffer that I first spoke to Files.

Redirect Examination

By Mr. Licking:

I had spoken to both of them, however, before the Spenger transaction. There was some discussion with Shaeffer and Files before April 24, the date of the Spenger transaction, concerning the nature of the overage. The money that was paid back to Williams was delivered by Newman to Files, and Files gave it to Williams, in two or three payments.

(Testimony of Charles Malaby.)

Further Recross Examination

By Mr. McDonald:

I never personally gave any money to Files. I gave it to Newman.

Further Recross Examination

By Mr. McGuire:

Lowenthal asked me to get a letter from the International Import Company authorizing him to act as salesman, and I told him when I went to Los Angeles I would get him one, but I never did. I told him that the International Import Company was a good company. I never did tell him that the entire transaction was on the up-and-up. I was present when McKinnon and Lowenthal discussed an extra dollar. The arrangement was that whenever McKinnon made a sale he was supposed to turn [198] over a dollar to Lowenthal, but that arrangement was never carried out. (621)

W. H. BENSON

a witness for the Government, being recalled, testified further as follows:

Direct Examination

By Mr. Licking:

After the Spenger check was cashed I had a conference with Shaeffer and Files and Spenger. It was several weeks later, in my hotel. We were trying to figure out some way to secure the money, and Shaeffer and Files were apparently willing to cooperate,

(Testimony of W. H. Benson.)

but no discussion was had as to the apparent violation of the escrow terms. After I discovered that the check had been cashed, but before the conference in my room between Spenger, Files, Shaeffer and myself, Files and I were alone. I asked Files if the check had been cashed and he said "yes," and, if I remember correctly, he turned the money over to Malaby. I told him I did not think that was exactly the right thing to do, and he said that it was his understanding that when the liquor was supposed to come in, the check was supposed to be turned over. Before Malaby left for Los Angeles he called me one evening and asked if I would do him a favor because he had to go to Los Angeles, and he understood the car of liquor was to come in, and wanted to know if I would take some papers over to Spenger and have him sign them, and leave a copy with Spenger, and mail the original to the International Import Company. I did that (625). Exhibit No. 4 on the stationery of International Import Company is one of the papers that I mailed, I think. I sent it with a letter of transmittal to International Import Company, and that is Exhibit 4-B for Identification. I never received any answer to that letter. I wrote several letters down but received no reply. I know [199] Cain personally, and have known him for some-time, but I have only met him personally about a year ago. I never met and discussed with Cain any of these transactions. I did not receive any reply to any of my letters, except that I received a reply from his attorney. In my letter to Cain I stated that

(Testimony of W. H. Benson.)

the money deposited by Spenger or the check deposited by him had been cashed and the cash taken. I never received from Mr. Cain any acknowledgment of that correspondence. The letter which I have just seen, which you have handed me, is headed "Burt Mathes" and is addressed to me on June 24, 1944.

Mr. Licking: Then I offer it as against Mr. Cain at the present time.

Mr. Ames: Are you offering it in evidence?

Mr. Licking: Yes, I am offering it in evidence.

Mr. Ames: I will object to it as incompetent, irrelevant and immaterial, serving to prove none of the matters with which we are concerned here today.

The Court: Your objection will be overruled.

Mr. Ames: Exception.

(The letter was marked U. S. Exhibit 31 in evidence.)

(Mr. Licking then read U. S. Exhibit 31.)
(627)

Cross Examination

By Mr. McDonald:

When I met Files in my room at the Hotel I think Files said that his agreement with Malaby was that when the car arrived the money was supposed to be turned over. Files was cooperative in every way in trying to secure this money. I would not accept any money on the Spenger transaction. I did not receive \$500. (628)

(Witness excused.)

Mr. Licking: * * * there has been introduced for

identification the certificate of the Office of Price Administration showing the filing by the Midvalley Distilling Corporation [200] of the price basis necessary for the establishment of a ceiling price on a particular commodity. The general provisions are set out in 8 Federal Register 11161, issued 8/9/43, effective 8/14/43, quoting:

“Under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942 as amended, and Executive Orders Nos. 9250 and 9238, maximum price regulation No. 445, distilled spirits and wine, which is annexed hereto and made a part hereof, is hereby issued.”

There is attached to the regulation No. 445 a statement of considerations for the issuance of the regulation, which was also issued as of 8/14/43, and is attached to the regulation.

After a preliminary finding of facts, there is this finding:

“These facts”—mentioning facts set out in the preamble—“combined with a greatly increased demand for beverage distilled spirits and wine at the consumer price level, have developed substantial pressure on prices.”

And then follows a statement of considerations which is some twelve pages long, setting forth the consideration on which the price regulation was adopted.

I call these to your Honor's attention not because I consider it necessary to introduce them in evidence, but for the convenience of the Court.

Mr. Cannon: You are not offering them in evidence, are you?

Mr. Licking: I am offering them in evidence at this time.

Mr. Cannon: I object, if your Honor please, on the ground that there is nothing in the indictment upon which [201] such an offer could be predicated, particularly in view of the demurrer heretofore interposed to the indictment, and in view of the further objection made to the introduction of evidence under the indictment on the ground no sufficient charge is made of any public offense, and the indictment itself in terms excludes any conspiracy to violate Section 902(a) of volume 50 of the appendix, U.S.C. It is immaterial, incompetent, and irrelevant.

The Court: Your objection must be overruled.

Mr. Cannon: Exception.

Mr. Ames: That objection goes to all of the defendants.

Mr. Cannon: Yes.

Mr. Licking: Now, if the Court please, I offer this in evidence as Government's Exhibit 1, heretofore offered for identification, as to all of the defendants. That is the certificate of the OPA—the certificate of filing with the OPA by the distillery.

Mr. Cannon: It is hearsay as to all defendants. I make the objection jointly and severally on behalf of each defendant.

The Court: Your objection will be overruled.

Mr. Cannon: Exception.

(U. S. Exhibit 1 for Identification was received in evidence.)

Mr. Licking: I now offer Government's Exhibit 2 for Identification against the defendants and all of them. (629-630-631) * * *

Mr. Cannon: To which I object on the ground it is incompetent, irrelevant and immaterial, no proper or any foundation laid as to any defendant, and I object to it on behalf of each defendant separately on the ground it is hearsay.

The Court: Your objection will be overruled.

Mr. Cannon: Exception. [202]

(U. S. Exhibit 2 for Identification was received in Evidence.)

Mr. Licking: May I have now Government's Exhibit 3 for Identification, the invoices covering the Vincentini transaction at Stockton? In connection with that, the Government's Exhibit 3-A for Identification, consisting of certified check debit, receipt signed by Mr. Malaby referring to the Files escrow, and also a receipt signed by Mr. Files for \$2100 dated April 20, 1944; also as part of that a photostatic copy of a note signed by Mr. Files and Mr. Shaeffer, defendant Files and defendant Shaeffer, dated June 21, 1944, agreeing to pay \$3,668 to Steve Vincentini.

Mr. Cannon: I make the same objection on behalf of all defendants jointly and severally, and particularly to the promissory note of June 21, 1944 attached as part of that exhibit offered, it being a note signed by Mr. Files and Mr. Shaeffer, on the ground it is hearsay as to anybody other than those two defendants.

The Court: The objection is overruled.

Mr. Cannon: Exception.

Mr. Licking: I also offer 3-B under the same statement of facts as this.

Mr. Ames: If your Honor please, I particularly make a further objection on the part of the defendant Cain and also for the benefit of all the defendants and for and on their behalf. I object to the introduction in evidence of any of these vouchers or bills, whatever they may be called, invoices, for the additional reason that this particular one, Exhibit 3, and all like it, do not in any degree show any violation whatsoever of the statute upon which the prosecution lies. On the contrary, these invoices show that these goods were sold at the ceiling price and nothing more. I make that general [203] objection. I am going to make an objection to all of these documents for the reason that they do not prove any participation in any crime whatsoever.

The Court: The objection will be overruled.

Mr. Ames: Exception.

(U. S. Exhibits 3, 3-A and 3-B for Identification were received in evidence.)

Mr. Licking: I also offer Government's Exhibit 3-C under the same statement of facts.

Mr. Cannon: I make the same objection on the same grounds.

Mr. Ames: I make the same objection on the same grounds.

The Court: The objection is overruled.

Mr. Cannon: Exception.

Mr. Ames: Exception.

(U. S. Exhibit 3-C for Identification was received in evidence.)

Mr. Licking: I am perfectly willing to stipulate in the record, your Honor, that the same general objection heretofore offered by counsel to the exhibits I have offered be entered in the record.

Mr. Cannon: As far as my client is concerned, we object to the offer of each and all of these exhibits that counsel has offered or is about to offer, and we make the objection on behalf of each and every defendant, jointly and severally, on the following grounds: that they are incompetent, irrelevant and immaterial, because they have no bearing upon any issue in the case, and on the further ground that they are hearsay as to these defendants; on the further ground that they are or could have no probative value on the proving of any conspiracy, because they relate to past transactions, and after the completion of the crime which the indictment alleges was committed. In other words, many of these documents and [204] transactions relate to occurrences subsequent to the date upon which the alleged conspiracy was complete, the crime of conspiracy was complete.

Mr. Licking: What date do you contend the conspiracy was complete?

Mr. Cannon: The date when the Court finds, if it does so find, that the first overt act alleged in the indictment was committed. I make that statement so there will be no question of the stand we

take in the matter. Counsel yesterday sought to establish——

Mr. Licking: I didn't particularly seek to do it, counsel.

Mr. Cannon: If I may have that running objection on behalf of each and all of the defendants, it may be understood that the objection goes to the offer of each and all of them, and I will not interrupt any more.

The Court: Your objection will be overruled.

Mr. Cannon: May I have a stipulation?

Mr. Licking: Yes, I am perfectly willing to stipulate for the purpose of the record that that objection may be considered as a running objection to all of the exhibits I propose to introduce.

The Court: Very well.

Mr. Ames: And so far as the documents are concerned, they could tend to prove no crime as alleged in the indictment. I make that objection on behalf of the defendants.

The Court: The objection is overruled.

Mr. Ames: Exception.

Mr. Licking: I offer in evidence certain exhibits concerned with the—for the purpose of identification to the Court at this time—those exhibits concerned with the so-called Spenger transaction, first Exhibit 4-A for Identification, which I request be given the same number in evidence, a check of Frank [205] Spenger & Company to Cash, bearing the endorsement which has been heretofore identified, and a receipt dated April 24, 1944, from Frank

Spenger, showing receipt of \$13,736 on a 90-day escrow agreement, signed W. A. Files.

Mr. Gillen: Is it offered against all defendants?

Mr. Licking: Against all defendants.

(U. S. Exhibit 4-A for Identification was received in evidence.)

Mr. Licking: I offer next Government's Exhibit 4 for Identification, and ask that it take the same number in evidence. It is offered as to all defendants, consisting of a certified check debit for \$1,809.50, and the invoices, receipts, and sales orders from the International Import Company showing a shipment of whisky in that amount. I also offer at this time as part of the same exhibit a sales order signed April 27, 1944, identified as sold to Frank Spenger, some 500 cases of McHenry Reserve whisky, bearing the notation "No cash down." This, your Honor will recall, was identified by the witness just on the stand, Mr. Benson, as enclosed by him at Mr. Malaby's request in his letter of May 3, 1944, which is Government's Exhibit 4-B for Identification. I offer the letter at this time.

The Court: It may be admitted and marked.

(U. S. Exhibit 4-B for Identification was received in evidence.)

Mr. Licking: I likewise request that the sales slip identified as having been transmitted in that letter be detached from this Exhibit 4 and made a part of the exhibit just offered, 4-B.

(The sales order referred to was made a part of U. S. Exhibit 4-B).

Mr. Licking: Exhibit 4, which I have heretofore partially [206] identified, consists of invoices, receipts, and a certified check debit for the payment of 50 cases of McHenry Reserve whisky, which testimony shows in the record was actually delivered to Mr. Spenger.

(U. S. Exhibit 4 for Identification was received in evidence.)

Mr. Licking: I next offer in evidence Government's Exhibit 5, which is concerned with the Vic Figone transaction. (632-637) * * *

Mr. Licking: ——I offer in evidence Exhibit 5 against all defendants and ask that it take the same number in evidence.

(U. S. Exhibit 5 for Identification was received in evidence.)

Mr. Gillen: By the way, before you leave 4-B, that Benson letter, are you offering that?

Mr. Licking: I did offer that against all defendants. (638) * * *

Mr. Licking: Next, Exhibit 6 and following exhibits. (638) * * *

(U. S. Exhibit 6 for Identification was received in evidence.)

Mr. Licking: I also introduce the sales slip as Government's Exhibit—is that 6?

The Clerk: 6-a.

(The sales slip was marked U. S. Exhibit 6-A in evidence.)

Mr. Licking: I next offer in evidence Govern-

ment's Exhibit 7 for Identification, which is the invoice and receipt for merchandise to be delivered, issued under the heading of the International Import Company. I ask that this receipt receive the same exhibit number in evidence.

(U. S. Exhibit 7 for Identification was received in evidence.) [207]

Mr. Licking: Now, in connection with the Thomason transaction, this is the transaction which was handled—one of the transactions which was handled by Mr. Lowenthal and apparently turned over by him to Mr. Malaby, in which Mr. Malaby executed the receipt for the overage payment. I introduce that as Government's Exhibit 7-A for Identification and ask that it be given the same exhibit number in evidence, as to all defendants.

(U. S. Exhibit 7-A for Identification was received in evidence.) (639-640) * * *

Mr. Licking: Next, Government's Exhibit 7-B for Identification, a sales slip, International Import Company, showing the order from Thomason on April 4.

(U. S. Exhibit 7-B for Identification was received in evidence.)

Mr. Licking: I now offer in evidence Exhibit 8, which are the exhibits concerned with the so-called McNeil transaction, the transaction with Margaret McNeil, which the testimony shows was initiated by Oscar Lowenthal, where he collected some \$5,000. The first exhibit is the invoices of the International

Import Company and a letter of transmittal showing the shipment of 50 cases of McHenry Reserve whisky to Margaret McNeil at the ceiling price. It will be recalled the witness testified it was received.

(U. S. Exhibit 8 for Identification was received in evidence.)

Mr. Licking: Government's Exhibit 8-A for Identification shows an order for 200 cases of whisky from Margaret McNeil dated April 29, 1944.

(U. S. Exhibit 8-A for Identification was received in evidence.)

Mr. Licking: I next offer in evidence Government's Exhibit No. 9 for Identification, which consists of different invoices, sales orders, and receipts, together with a letter of [208] transmittal from the International Import Company showing the sale to the Miami Inn. Your Honor will recall that particular case; Pete de Georgis testified in that connection it showed the sale to the Miami Inn of 100 cases of McHenry Reserve whisky at the ceiling price.

(U. S. Exhibit 9 for Identification was received in evidence.)

Mr. Licking: 9-A for Identification shows the order dated April 5, 1944 for the same liquor.

(U. S. Exhibit 9-A for Identification was received in evidence.)

Mr. Licking: I next offer in evidence Government's Exhibit 10 and 10-A. Government's Ex-

hibit 10-A consists of two cards from the—of the International Import Company, one the card of O. (Rosie) Lowenthal, the other the card of Charles Malaby.

(U. S. Exhibit 10 for Identification was received in evidence.)

Mr. Licking: No. 10-A. I now offer 10-A for Identification in evidence. It consists of sales receipts and invoice on the heading of International Import Company showing the legitimate or ceiling transaction.

Mr. Gillen: What case is that, Reali?

Mr. Licking: Pete Reali. In that case Mr. Reali and Mr. Malaby both testified as to the receipt by Mr. Malaby of the overage payment.

(U. S. Exhibit 10-A for Identification was received in evidence.)

Mr. Licking: Government's Exhibit 11 is the Bryden transaction, the proprietor of the Jungle Inn in San Pablo. (641-643) * * *

(U. S. Exhibit 11 for Identification was received in evidence.)

Mr. Licking: Next, Exhibit 12 and 12-A. These are the [209] Nello Nomellini transaction, the Bluebird Cafe and the El Lido Bocci Ball Alley. (643) * * *

(U. S. Exhibits 12, 12-A and 12-B for Identification were received in evidence.) (644) * * *

Mr. Licking: —Exhibit No. 13. I now offer this in evidence.

(U. S. Exhibit 13 for Identification was received in evidence.) (644)

Mr. Licking: Now 14 and 14-A—to return to the Costa transaction, 13-A for Identification is a certified check for the amount shown in the invoice which has previously been identified as Government's Exhibit 13.

(U. S. Exhibit 13-A for Identification was received in evidence.)

Mr. Licking: And Government's Exhibit 13-B is the sales slip for Costa's place in Oakland, showing 50 cases of whisky, and Government's Exhibit 13-C is apparently a photostatic copy of 13-B.

(U. S. Exhibits 13-B and 13-C for Identification were received in evidence.)

Mr. Licking: Now Exhibits 14, 14-A, 14-B and 14-C. Government's Exhibit 14 shows the original order, the receipts of the Valley Express Company, shipping receipt or invoice. I now offer 14.

Mr. Gillen: Which transaction is that?

Mr. Licking: Amaro Pitta, North Pole Club.

Mr. Gillen: Pitta?

Mr. Licking: Yes.

(U. S. Exhibit 14 for Identification was received in evidence.)

Mr. Licking: Government's Exhibit 14-A for Identification, which I now offer in evidence, is a sales slip or order blank, [210] rather, executed, April 22, 1944 for 100 cases of McHenry.

Government's Exhibit 14-B for Identification, I

now offer in evidence. It is a receipt signed W. O. Files, showing the receipt from Amaro Pitta of \$3,200, (645-646)—I offer Government's Exhibit 14-C for Identification, a note dated June 22, 1944, signed by W. O. Files and R. H. Shaeffer, promising to pay to Amaro Pitta the sum of \$3,200.

(U. S. Exhibits 14-A, 14-B and 14-C for Identification were received in evidence.)

Mr. Licking: Government's Exhibit 15 is the sales invoice and receipts which the record shows were executed by Mr. Malaby, given to Mr. Burnett, and were by Burnett and Rocco caused to be delivered to Lichtenberg and Johnson, Boyes Springs resort.

(U. S. Exhibit 15 for Identification was received in evidence.)

Mr. Licking: Government's Exhibits 16 and 16-A, the Barotti transaction, handled the same way as the Johnson and Lichtenberg transaction, and 16-A, a receipt given by Rocco to Enrico Barotti for \$4,120, dated May 17, 1944.

(U. S. Exhibits 16 and 16-A for Identification were received in evidence.)

Mr. Licking: Exhibit No. 17 is the other one of the three Sonoma transactions, the transaction with Charles Ferretti, which has been identified as handled by Burnett, Rocco, and Mr. Malaby.

(U. S. Exhibit 17 for Identification was received in evidence.)

Mr. Licking: No. 18 for Identification is the

Elliot Smith transaction. (646-647) I offer Government's Exhibit No. 18, showing the invoice transaction under date of May 23. (647)

(U. S. Exhibit 18 for Identification was received in evidence.) (647) [211]

Mr. Licking: In connection with that same transaction I introduce the order blank under the stationery of International Import Company showing the inception of the transaction, April 8, 1944, and the order of 50 cases of McHenry whisky.

(U. S. Exhibit 18-B for Identification was received in evidence.)

Mr. Licking: In that connection I also offer Exhibit 18-A, which has been identified by James Gibson.

(U. S. Exhibit 18-A for Identification was received in evidence.)

Mr. Licking: Next, Government's Exhibit 19 and 19-A. Government's Exhibit 19 for Identification is the check made payable to Pete de Georgis. (647-648) * * *

(U. S. Exhibits 19 and 19-A for Identification were received in evidence.)

Mr. Licking: Government's Exhibits 20 and 20-A are checks signed by John Kusalo, one of them to the International Import Company for \$868.56, which is the amount collected in payment for the invoice price shown by Government's Exhibit 20-B, which I now offer.

Government's Exhibit 20 for Identification is a

check payable to Cash which has been testified as cashed and given to de Georgis in payment of the overage on the shipment described in Government's Exhibit 20-B.

(U. S. Exhibits 20, 20-A and 20-B for Identification were received in evidence.)

Mr. Licking: Exhibit No. 21 is the Abrams transaction up in Santa Rosa County which was identified by Mr. Malaby as a transaction which he handled in connection with the general scheme.

(U. S. Exhibit 21 for Identification was received in evidence.) [212]

Mr. Licking: 22 and 22-A are Mr. Malaby's letters of agency, one consisting of his agreement to work for the International Import Company, and the other a statement under the signature of the International Import Company, Burt Cain, that he is so employed.

(U. S. Exhibit 22 and 22-A for Identification were received in evidence.)

Mr. Licking: I now offer in evidence the franchise agreement whereby Burt Cain secured from the Midvalley Distilling Company the agency or franchise to distribute in the territory described, including this territory, the production of that distillery. When we originally discussed this, I have been told, we agreed there was no objection to the use of a copy rather than the original, or if you had the original we would put the original in.

Mr. Ames: I don't know if I have the original

or not. I will have to look in my file. The copy is all right.

(U. S. Exhibit 23 for Identification was received in evidence.)

Mr. Licking: Exhibit No. 24 is the picture of Mr. Malaby which it has been testified was used in the matter of identifying him as connected with some of the transactions. I will offer that as merely bearing on the identity of Malaby in the particular transaction.

(U. S. Exhibit 24 for Identification was received in evidence.)

Mr. Licking: 25, the Di Silva transaction, I offer first the order slip under the heading of International Import Company showing the order dated 4/14/44 for 10 cases of McHenry whisky; and the invoice and receipt subsequently issued for the transaction, dated 5/23/44. (648-649-650)

(U. S. Exhibits 25 and 25-A for Identification were recieved [213] in evidence.) (650-651) * * *

Mr. Licking: Exhibits 26, 26-A, 26-B and 26-C have to do with transactions with one Gus Goldstein. (651) * * *

(U. S. Exhibits 26, 26-A, 26-B and 26-C for Identification were received in evidence.)

Mr. Licking: Exhibit 27 is the Lester McWilliams case. There is an undated receipt for money delivered which has been identified, which is Government's Exhibit 27 for Identification.

(U. S. Exhibit 27 for Identification was received in evidence.) (652) * * *

Mr. Licking: Exhibit No. 28 for Identification is the telegraphic money order testified as received by P. Rocco after Burnett had called up the International Import Company.

(U. S. Exhibit 28 for Identification was received in evidence.)

Mr. Licking: Exhibit No. 29 for Identification is the letter dated June 27, 1944 from Mr. Malaby to Mr. Burnett. (652-653) * * *

Mr. Licking: At this point, your Honor, I will offer in evidence a letter dated June 27, 1944, from Charles Malaby, 2766 Matthew Street, Berkeley, California, addressed to Mr. D. Burnett, in Los Angeles, and identified here as given by Burnett to Rocco. That letter is offered as to all the defendants for the purpose of showing that the conspiracy had not terminated and that they were endeavoring to deliver the whisky, and in connection with the Government Exhibit just offered, the telegraphic money order identified as sent to pay for part of Barotti's claim on June 13th, to show that the conspiracy was still being attempted to be carried on.

(The letter was marked U. S. Exhibit 29 and read in [214] evidence.

Mr. Licking: Next, Government's Exhibit 30 for Identification, a receipt showing the payment of money from Charles Malaby on April 21, 1944, to one Leo J. Sargiani.

(The document was marked U. S. Exhibit 30 in evidence.)

Mr. Licking: That is the Government's case. We rest. (654)

Mr. Sheffy: At this time, your Honor, I want to present a motion on behalf of all of the defendants, jointly and severally, to strike from the record certain testimony as to conversations that were admitted by the court subject to a motion to strike, those conversations being the conversations that were had with some of the defendants with third persons not in the presence of the other defendants.

I think I can make the motion general after stating, making reference to the testimony of one or two of the witnesses. For example, the witness Steve Vincentini, who testified he contacted Mr. Malaby in his apartment and talked about whisky, that there was nobody present but himself and Mr. Malaby, and the court permitted the witness to state what conversation was had in Mr. Malaby's presence, subject to a motion to strike, and later he said as to the conversation with Malaby the motion would apply to all the defendants except the defendant Malaby. He testified that after talking with Mr. Malaby in his room that he then went to the office and talked to Mr. Files, Mr. Malaby and Mr. Shaeffer, and the court permitted, subject to a motion to strike, the conversation that was had at that place to be given, and in that instance the motion would be on behalf of the other defendants who were not present at that time.

The motion, therefore, is presented in each instance on behalf of those defendants who were not present at the time the conversations were had. I can go through my notes and take up each witness, witness by witness. [215]

Mr. Licking: I am perfectly willing to stipulate that we haven't introduced testimony relating to any conversation at which all of the proposed defendants were present. There has apparently been no such conversation.

Mr. Sheffy: That is true, Mr. Licking, but in order to have the matter straight in the record, instead of taking each witness, witness by witness, I believe that I can make the general motion on behalf of the defendants who were not present at conversations testified to by one or more of the defendants (sig. witnesses), when the other defendants were not present, and as to all of that testimony I present to the court now a motion to strike that testimony. May it be stipulated, Mr. Licking, that my motion goes to the testimony of all of the witnesses?

Mr. Licking: If it is agreeable to the court, and the record may also indicate that that objection has been introduced as to each conversation as to which there has been testimony, and the objection has been entered and a motion to strike is now made on behalf of those defendants who were not present at that conversation on the ground that as to them, I presume, it is hearsay.

Mr. Sheffy: Hearsay; and on the further ground the statements of one of the alleged conspirators

not in the presence of the others cannot be used to prove the conspiracy.

The Court: Is the matter submitted?

Mr. Sheffy: Yes, your Honor.

The Court: The motion will be denied.

Mr. Sheffy: Exception. (654-655-656)

Mr. Cannon: If the Court please, may I just offer this further suggestion, that with respect to the motion which is made on behalf of all of the defendants that we call your [216] Honor's attention particularly to all of the testimony that was introduced in evidence here bearing on any transaction or any conversation had, and also with respect to any documentary evidence introduced hearing upon a transaction subsequent to April 24, 1944, and make the motion specifically in behalf of each defendant not definitely connected by his personal presence with any transaction occurring subsequent to April 24, 1944.

Mr. Licking: You pick April 24th rather than the date you first indicated, March 10th?

Mr. Cannon: I want to say this: I picked April 24, 1944, for this reason, and I will argue at another time in the event your Honor will see fit to overrule this motion, or deny the motion. I pick that date at this time because that is the very latest overt act alleged in the indictment. As a consequence, if counsel has not yet proven a charge that the conspiracy existed on April 24, 1944 and that some overt act in furtherance of that conspiracy had not been carried out by that date, the prosecu-

tion must fail, and if at this stage of the proceeding your Honor feels that there has been a conspiracy shown to have existed between some or all of these defendants which conspiracy was in existence prior to or on April 24, 1944, and that some overt act was committed, one of the overt acts alleged in this indictment was committed by that date, then your Honor must necessarily dismiss as to all the defendants, or as to those against whom your Honor may fail to find a conspiracy existed. They cannot, in other words, offer evidence as being binding upon any defendant and as tending to establish any conspiracy, anything that occurred after April 24, 1944, because that is the last date charged in the indictment when an overt act was committed. If the overt act was committed on April 24, 1944, or any date prior thereto, the crime alleged in the indictment was complete, and, therefore, everybody was on their own from [217] that time out. (657-658) * * *

So, therefore, I move on behalf of each and all of the defendants to have stricken from the record each and every conversation, each and every transaction, each and every document bearing date subsequent to April 24, 1944, and I make that motion on behalf of each of them jointly and severally.

I might as well make another one, while I am at it. I also move to strike from the record—I make the same motion with respect to each defendant as to each transaction, conversation, and as to each piece of evidence, documentary or oral, which related to any transaction subsequent to any date

of the commission of any overt act which your Honor may at this stage of the proceeding feel has been established.

The Court: The motions, and each of them, will be denied.

Mr. Cannon: Exception in each case.

Mr. McDonald: May it please the Court, on behalf of the defendant W. O. Files I wish to adopt on his behalf and make part of this record each and every motion made by Mr. Sheffy and Mr. Cannon.

I further move to strike from the record all evidence, oral or documentary, in reference to the transaction involving the witness Figone, on the ground the same is incompetent, irrelevant, and immaterial, and hearsay as to the defendant Files, as the conspiracy or no part thereof has been proven.

I also wish to make the motion on his behalf on the same grounds in reference to the witness McNeil; upon the same ground as to the witness Pete de Georgis; upon the same ground as to the witness Pete Reali; upon the same ground as to the witness Bryden; upon the same ground as to the witness Manuel Costa; upon the same ground as to the witnesses Lichtenberg and Johnson; upon the same ground as to the witness Barotti; [218] upon the same ground as to the witness Ferretti; upon the same ground as to the witness Elliot Smith; upon the same ground as to the witness Caputa; upon the same ground as to the witness

Kusalo; upon the same ground respecting a man by the name of Abrams, from Santa Rosa; upon the same ground as to any transaction involving John Di Silva; upon the same ground as to a certain money order sent to the witness Rocco; upon the same ground as to the letter from Malaby to the witness Burnett; and upon the same ground as to any testimony in reference to a receipt from Malaby to a man named Sargiani.

Mr. Licking: Submitted.

The Court: Motions will be denied.

Mr. McDonald: Exception.

Mr. Gillen: May it please the Court, may I adopt Mr. McDonald's motions, excepting to extend that motion with regard to all testimony of all of the alleged or intended purchasers of whisky presented by the Government, here, on behalf of the defendant Shaeffer, and with regard to all of the exhibits on behalf of the defendant at this time.

Mr. Licking: Submitted.

The Court: Motions will be denied.

Mr. Gillen: Exception.

Mr. Cannon: If the Court please, on behalf of each of the defendants, jointly and severally, I make a motion at this time to dismiss and ask your Honor to acquit each and all of the defendants on the indictment on the ground, first, that the indictment does not state facts sufficient to constitute a public offense, or any offense punishable by the laws or the Constitution of the United States; on the further ground the indictment is not drawn

with that degree of certainty or exactness [219] required in criminal pleadings to enable the defendants to properly make their defense; on the further ground that the Government has failed to establish at this stage of the proceedings any evidence sufficient to enable your Honor to make a finding of guilty as against the defendants, or as against any of them.

Mr. Licking: Submitted.

The Court: The motions will be denied.

Mr. Cannon: *Exception*. Exceptions taken jointly on behalf of all the defendants, and separately for each defendant.

Mr. Sheffy: On behalf of the defendant Cain, I wish to adopt the motion made by Mr. Cannon, and also to move to dismiss on the special ground that as to the defendant Cain the indictment does not state an offense committed within the jurisdiction of the court. (658-659-660-661-662) * * *

Mr. Licking: Submitted.

The Court: Motions will be denied.

Mr. Sheffy: *Exception*. (663) * * *

Mr. Cannon: If the Court please, so far as Mr. Nathan Newman is concerned, we rest. (663) * * *

HARRY DREWES MATTHIAS,
a witness for the Defendant, Burt Cain, being duly sworn, testified:

Direct Examination

By Mr. Ames:

My name is Harry Drewes Matthias, and I am

(Testimony of Harry Drewes Matthias.)

working with flux to fuse aluminum. I live in West Los Angeles. I know Charles Malaby, and I just passed him in the hall, but prior to that I met him in Los Angeles during the early part of the second week in January. I had a conversation with him in the [220] Biltmore Hotel. Someone else was also there but whether or not he heard the same statement I do not know. Charles B. Taylor was there. Malaby said at that time he was not worried about this indictment up north, as he had put it, he had some other people to blame. He said he could not stand any indictment on grand theft in Los Angeles, and he thought I was acting like a child.

Cross Examination

By Mr. Licking:

Taylor is a lawyer, but not my lawyer, but a friend of mine. Taylor and I and Malaby had an appointment to receive some money Malaby owed us for a business deal that Taylor had had with Malaby, and Taylor asked me to go with him to try to collect it, but the fact that we did not would make no difference in my testimony here. I am not friendly with Mr. Cain. I am not acquainted with his secretary. Monday was the first time I met her. I have been regularly and daily in company with Mrs. Anderson since the trial started—that is since last Monday. I only knew Mr. Cain since last Monday (676). I have never discussed with Mrs. Anderson that she is going to be a witness. She knows I am to be a witness, because I

(Testimony of Harry Drewes Matthias.)

told her. She told me she was going to be a witness, and I told her I was, too. We did not discuss between us the nature of the testimony we were to give. I saw Mr. Malaby yesterday for the first time around here, since I have been in San Francisco. I know Mr. Taylor is in San Francisco now, but I did not see him until 11 o'clock last night. He did not mention anything to me then about trying to collect any money from Malaby (678).

(Witness excused.)

BURT CAIN,

one of the Defendants, called on his own behalf, being duly sworn, testified as follows:

Direct Examination

By Mr. Ames: [221]

I am one of the defendants in this case, and live at 413 South LaBrea, Los Angeles, California, and my occupation—I was in the wholesale and importing business in connection with liquors. I have lived in California twenty-one years and have a wife and family. For about a year I have been in the wholesale business and about a year and a half in the importing business, and conduct my business under the name of the International Import Company. I have no partners, and my business is not a corporation. Before meeting any of the defendants in this case I was engaged in importing liquors of various

(Testimony of Burt Cain.)

kinds from Mexico and in selling to wholesalers, and I obtained a wholesaler's license under the laws of the United States and also under the State laws. The documents you have shown me is a wholesaler's basic permit, and an importer's basic permit issued by the Federal Government, and the California State Wholesale and Importer's license. (682) The wholesaler's basic permit from the Federal Alcohol Administration was issued to me March 6, 1944.

(At this point these documents were marked Defendant Cain's Exhibit D in evidence.) (682)

I first met the Newmans, Nathan and Morrie, about the middle of March, 1944; and Malaby about March 21, 1944. I had a conversation with the Newmans in connection with the securing of a license for the sale of whisky from the Midvalley Distilling Corporation and subsequently obtained a license and ordered a car of whisky from that company. It was to be purchased by me as a wholesaler and distributor through the regular channels to the retail trade. I made Nathan Newman sales manager of the company, and Malaby was a salesman on commission. I at no time had any conversation with Nathan Newman or Charles Malaby concerning the black market in liquor (683). There was no discussion with reference to the matter of charging any [222] overage on the sale of liquor; and no conversation was had by me with them on that subject. I at no time received any overage on the sale of liquor, and knew of no one else who was receiving any such overage.

Mr. Cannon: If the Court please, may we under-

(Testimony of Burt Cain.)

stand again, since Mr. Newman has rested, that I therefore don't feel under the necessity of making objection to this testimony. If your Honor requires me to do it, I will do it.

The Court: There is no necessity that I see. Proceed. (684)

(Witness continuing:)

I first suspected any persons in my employ as having illegal transactions in liquor about the middle of June, when I was in New York. I left to go east about June 9th or 10th, and returned July 4. I first gained these suspicions from newspaper clippings that had been mailed to me about the arrest of Mr. Malaby in San Francisco in connection with black market activities (685) and returned to Los Angeles and had a conversation with Malaby about it at my office, in the front office, and also in the back of the office. I did not see Mr. Malaby from the time that I gave him a letter of employment, about March 22, and the time that I saw him in the railroad station as I was going east. I did not see him to exceed twice, the whole time. Once I took him in the room in the back, upstairs, and told him I wanted to talk about the black market activities, but this was not between March 22 and July 4. I took him into that back room after I returned from New York in July. I had a conversation with him. Newman was there. Miss Anderson was there on several occasions, just for a few moments, and went out again. I asked Malaby where this black market had taken place, who got the money, and what became of it, and why it had

(Testimony of Burt Cain.)

been perpetrated on my license. He admitted that he had done it, and would not explain where the money had [223] gone. I demanded that the money be returned, and he said he could not return it. There was some conversation about my putting up some money for Malaby, because he wanted money for himself, claiming large commissions. I pointed out the record that he had no commissions coming at that time, that he had overdrawn himself, and I would not advance him any further moneys. There was a conversation about attorney's fees. He said he had to raise \$5,000, as a retainer for an attorney, and wanted to know if I would loan it to him, and I told him "no." Subsequently, he came in again and I told him I did not have \$5,000 to give him for his lawyer. He asked me that if he sold my license for a large sum, if I would pay him \$5,000, and I told him that I would. But he never did sell that license for that amount. He did make some threats against me if I refused to put up the money. This was in the latter part of July, or the first of August (689), while Miss Anderson was there with Malaby and me. Malaby said that if I did not put up money to help him out he was going down and incriminate me with the black market operations which he had been making in San Francisco. I told him that the Alcohol Tax Unit were at that time auditing my records, and I would be glad to have him tell them in my presence what he had said, and offered to make an appointment for the next morning so that he could tell all he knew to the tax people. Malaby did not show up. The Alco-

(Testimony of Burt Cain.)

hol Tax Unit were at that time making an audit of my books. A Mr. Williams Clements was there and the other man's name was Harold Rassi (690). I have in Court my books of accounts which were kept by Mrs. Anderson and a certified public accountant (692), and I am ready, willing, and able at this time or any other time to submit them to Mr. Bird or any other recognized officer of the United States Government for inspection. The books that you show me are my [224] Journal and Ledger of the International Import Company, and miscellaneous records from the files (693), and they are the principal books of the Company.

Mr. Licking: I was just offering to make a stipulation with regard to these books which I think may satisfy him. I have no doubt but the witness on the stand and Mrs. Anderson will testify that these books, as here submitted, show no illegal transactions, no black market transactions.

Mr. Ames: You say you would stipulate to that?

Mr. Licking: I am perfectly willing to stipulate that these books, as shown here, show no such transactions, yes.

Mr. Ames: Very well. Then I shall have to go to the next question.

Mr. Licking: And Mrs. Anderson will so testify, and the witness on the stand will so testify.

Mr. Ames: We will take the stipulation and go on to the next step. I am offering the books in evidence.

The Court: Admitted and marked.

(Testimony of Burt Cain.)

(The books of account were marked Defendant Cain's Exhibits E and E-1.) (695)

(Witness continuing:)

Besides these books I have invoices and bank accounts which reflect the moneys that were received by me in the course of these sales of McHenry Reserve. I do not have the bank accounts with me, but I am willing to produce anything of that kind that I have. I did not at any time receive any money from Malaby or from anyone else concerning or having to do with any overages. I never at any time received any part of the \$10,000 received from Spenger. There is no truth whatever in the statement that Malaby made that \$1500 was split in equal parts of \$500 between myself, Malaby and Newman, in the Palace Hotel. I have never before in Court seen Mr. Cardinelli. I heard him testify that when he was in the [225] Palace Hotel I was lying on the bed in that room, but I did not see any such person as Cardinelli. I never at any time told Malaby that there was being paid to the Distillery a total of \$72,000 to purchase a car of whisky. At the Palace Hotel I did not at any time hear anybody say anything about collecting any money or overages (697). I discharged Malaby about June, 1944, in Los Angeles. No, I am wrong, it was July 18, 1944. At that time there was considerable recrimination and some unpleasant rejoinders, to the effect that he would ruin me; Miss Anderson and Mr. Newman were present when I had that con-

(Testimony of Burt Cain.)

versation with Malaby. I told him that he must leave immediately. He was in my office about the middle of August, 1944, in the presence of Mrs. Anderson; and Malaby said that I had never received a dime of the black market money and that I knew nothing of the transactions because they had all taken place in San Francisco, and I had no knowledge of them. There have been no complaints about any transactions that took place in Los Angeles, as far as I know. I recall a transaction involving a check of \$904 from the Lake Inn Corporation (698). I have never seen that check. Mr. Malaby admitted to me that he took the check, endorsed it and put the money in his pocket without my permission; and I told him he would have to refund the money. Before this court proceeding I never did see Government's Exhibit 4-B which is a letter signed by W. H. Benson, under date of May 3, 1944, together with the envelope. I did not know until recently that that letter had ever been delivered to my office. Malaby came to Mr. Mathes' law office on the 13th of this month, and stated that he had stolen the letter off my desk, and that he was going to use it in the pending trial against Mr. Benson. I asked him where the letter was and he said that I did not know anything about it. He had seen it [226] on my desk and had put it in his pocket and walked out (700). He made that statement in the presence of Burke Mathes, who is my personal attorney, and who is in the court room. Malaby at that time said that if Benson gets on the

(Testimony of Burt Cain.)

stand and testified about the Spenger matter, he would use the letter as it would hurt him, Benson. I never had the letter in my possession and never saw it until I came into this court room. I never at any time entered into any conspiracy to violate the law of the United States respecting the ceiling price of liquor; and I never at any time sold any liquor above ceiling price to anybody. The only whisky at any time that I had was McHenry Reserve, and I had never even heard of Doggerty, or Rocky Creek, or straight whisky (701). The only whisky at any time that I never had was the blended McHenry Reserve which was embraced in the car-load that was condemned. On March 10, 1944, I did not know either Nathan Newman, Charles Malaby, R. H. Shaeffer or Walter O. Files; I did not on that date meet or conspire with them. On March 11 I was not present at any meeting in San Francisco with them. I never did know the defendant Lowenthal. I believe I first met him here in the hall of this building. He was never employed by me, as a salesman or anything. I never did know in Oakland James Gibson and Elliot R. Smith (702). I never had any transaction with them at any time unless they were in my files as purchasers of whisky at ceiling. I never saw Martin Fuchslin, or Robert C. Thomason. I was never on the premises at 309 Kearny Street, San Francisco; and was never in the premises occupied by Frank Spenger in Berkeley. I do not know him. I only received an invoice from him. He bought 50 cases

(Testimony of Burt Cain.)

of whisky from me at ceiling, and he is a complete stranger to me.

Cross Examination

By Mr. Licking: [227]

The first time I ever suspected there was anything wrong in this series of transactions was when I was in New York, sometime in July. I have known Benson casually. I did not receive that letter from him regarding the Spenger transaction. After July, or during the month of July, I received several letters from Benson. I first talked to Mr. Mathes about this case when I returned from New York. I did talk to him over the long distance phone from New York. After looking at Government's Exhibit No. 31, dated 6/24/44, I do not wish to change my testimony to the effect that the first letters I received from Benson about the Spenger deal were in July. That letter, Government Exhibit No. 31, never reached me. I did not say that I had never heard any repercussions about the Spenger deal until I returned from New York. I had never received any complaints from Mr. Benson in that connection until after I returned from New York. I had a telephone call from Mr. Files in New York, who had received my address from Mr. Mathes. I did not know Files at that time. I asked Files over the phone who he was, and what it was about. Files did not tell me he had received for the account of International Import something like \$13,000 from Mr. Malaby. He did mention the sum of \$13,000, but I told him I knew nothing about it at all

(Testimony of Burt Cain.)

(706). That was while I was in New York, sometime after the middle of June. I notice that Exhibit 4-A and Exhibit 4 of the Government's, the check and receipt, that the check is dated April 24, and that the perforation on the check shows that it was cashed about the 26th. I also note the date on Mr. Files' receipt. I never saw it before. The first time I heard about this was when I was in New York. I had money of my own to go into this business and to buy a carload of liquor. That money was in the bank in Los Angeles; the Bank of America. I think I had when I started in this business [228] about six or seven thousand dollars in cash and credits. When I first made my original application for a liquor license it was not refused. There were two or three people who offered to lend me money. At the time I made my application for Federal and State license, in 1943, there were several people who were going to lend me \$50,000. I am trying to recollect who they were. One was Max Shulman (709), a prominent owner of the International Provision Company. He introduced me to another man, but I cannot recall his name. I did not get any money from them. I borrowed money from James Lee and from Marie Marble, and I had moneys coming to me from credits in Mexico. My first license for the liquor business was in March, 1944; it was a Federal license. The California license was dated November, 1943. I was working for Willard Marble at the Latin-American Exporting Company at the time, before my Federal

(Testimony of Burt Cain.)

license was issued. I was working on a commission basis (711). I knew in the course of business transactions that Mr. Spenger had ordered some liquor from me, because I had an invoice for it. I did not have the original order slip and never saw it. I did see the invoice dated May 23, which is Exhibit 4, dated in May sometime. That is the first time I knew about Mr. Spenger. I deny that I ever saw a duplicate of the order which is Government's Exhibit 4-B. The first thing I knew about the Spenger transaction was when I received the executed invoices for shipment marked May 23. We never took orders as distinguished from executed invoices. We did take orders, in all cases. The document marked "Customer's Copy" is an invoice (715). Our customary course was not to take an invoice at the outset of any transaction, but to have an order executed. The first document which you have shown me stipulates at the bottom, "This is an order, merely an offer to purchase, and is not [229] binding on the International Import Company until signed by Burt Cain, sole owner." This is an order. This is the first paper that we customarily caused to be executed. When I first started in the wholesale business, not the importing business, I caused these forms to be printed up. They were the only items I had on which to take orders in the wholesale business. About the 14th of April I discontinued the use of these types and substituted the one which you now show me, and I so notified the salesman. Thereafter I discontinued the subsequent

(Testimony of Burt Cain.)

one because it was not proper. The first form of order we used is that shown on 3-B. There were three colors, white, yellow, and green, and were for the customer, the salesman, and the office. That is one of the first forms. Then I used the second one. I do not find any of those here (720). The one you now show me is the final one, and it is dated 5/23/44. That form is the only basis upon which I would accept an order, and is the form we used in confirming an order. 3-B is the form we used at the beginning, when I started, and was used during the first part of April. April 14 I ordered them discontinued. In other words, I secured this particular invoice order form, identified in Government's Exhibit No. 4, and required them to be executed in all cases where I had received other sales documents. I have a consolidated sheet that would be simpler in showing the orders that I confirmed, as reflected in my books, and this list discloses the different orders which I received and which I accepted for McHenry whisky during the period of time that I was in the wholesale importing business. It shows the order from Steve Vincentini (722). This list runs from May 24 to June 5. Prior to May 24 I received orders on these other forms and returned them. Referring to the Spenger case, it is not a fact that before sending the invoice back to Spenger to be [230] executed by him, I received another order. I never saw that order before I came here. In the Vincentini case I never saw an ordinary sales slip showing "no

(Testimony of Burt Cain.)

cash down.” (723) I cannot remember whether in the McNeil transaction I received an ordinary sales slip or an invoice, but in those cases where I returned the documents, and where I accepted the orders, I initialed the documents before they were returned. It is not a fact that I received from Mr. Malaby and Mr. Newman an equivalent of an order for merchandise showing “No cash down.” In no case did I ever receive any overage; and I knew of no overage until sometime when I was back in New York to exchange a carload of whisky which had been condemned by the Board of Health in Los Angeles. I never had received any complaints by anyone who had theretofore deposited any money with Malaby, Newman or Files, and knew nothing whatever about that before I went to New York (725). Concerning the money which I put in this business, I said I had approximately \$6000 in cash besides moneys which I had borrowed from personal friends, and besides credits which I had in Mexico with which to start into business. I borrowed \$5,000 from Nathan Newman. Mr. Newman and I never talked about black market money and I never knew anything about it. When Malaby made threats against me I felt very unkindly about it, but I was not timorous or fearsome (725). I had a perfectly clear conscience then and I have a clear conscience now. I knew nothing about overage. Malaby attempted to get money from me by one threat or another, and I refused to advance him any money. I spoke to Ehrlich at the request of Malaby, who

(Testimony of Burt Cain.)

had told me that he, Malaby, was going to sell my license for \$30,000, and wanted to know if I would give him \$5,000 if he did sell it for \$30,000, and I told him I would. I also told him if I sold it for \$15,000 I would still give him \$5,000; and that I thought he was romancing (727). [231] I told Mr. Ehrlich that. I wrote Mr. Ehrlich that I would pay him \$5,000 for Mr. Malaby's defense, but made no reference in that letter about selling anything.

Mr. Licking: I offer this in evidence with reference to this defendant only.

(This letter was marked U. S. Exhibit 32 in evidence, and was read by Mr. Licking.) (728)

(Witness continuing:)

Ehrlich and I had a subsequent talk in his office to the effect that I could not and would not become a party to paying his law fees at that time. Mr. Ehrlich stated he wanted \$5,000 as a retainer and perhaps \$10,000 or \$15,000 for a fee. I told him it was impossible for me to loan money to this man, guilty or otherwise. I told him that if I did not receive the money from the sale of that license within a week, I would have no part of it. At the time the letter was written I was in Mr. David Cannon's office, and I dictated this letter and left it in Mr. Cannon's files. The letter was never directed to, or mailed to Jake Ehrlich, so far as I know. Later, I wrote another letter to Mr. Cannon requesting that the letter be not forwarded to Mr. Ehrlich, and stated my reasons therefor, because I did not want to have anything to do with it.

(Testimony of Burt Cain.)

I think Mr. Malaby got a copy of that letter from Mr. Cannon's secretary without Mr. Cannon's knowledge. That is what Malaby told me (731). I had commissions in excess of \$20,000 coming to me from Mexico, when I started this business. Part of them were paid by Mr. Marble and the Latin-American Export (732). I would say, roughly, I collected \$4,000; that is within \$500 of what I collected. I did not deposit it to the account of the International Import Company. I made some of the payments that I made on behalf of the International Import Company from my own personal account, and some from cash [232] I had on hand. The money which I put into the Importing Company was partly, \$6000 in cash, and part in proceeds from commissions afterward collected from Mr. Marble, and from Mexican concerns with which he is interested, and some from cash I had on hand, and \$5000 which I borrowed from Morrie and Nathan Newman. I did not bring my bank accounts and statements of the International Import Company with me to court. I had no idea that I would be requested to produce them; but I brought my books. Every deposit that I made on account of the International Import Company is covered by a deposit slip. I think the books would show whatever money came from me personally. I got some of the cash from James Lee. He would not have a record of the money that I had of my own. James Lee loaned me between \$8,000 and \$10,000. I paid the invoice price of \$42,000 plus to the Distillery

(Testimony of Burt Cain.)

for the carload of liquor, plus the freight and the handling charges. I do not remember the total amount I paid. The invoice that I have here which is Defendant's Exhibit for Identification shows the cost, but that is not the total cost. There was paid to the railroad company about \$1200; and \$600 or \$700 to the warehouse company, and \$600 or \$700 or \$800 to transportation companies, and other legitimate expenses. I did not send Morrie Newman any money for any transaction in connection with this matter with a representative of the Mid-valley. The 2500 sent back to pay for the franchise is a different story. I sent that \$2500 to the Mid-valley Distillery, Incorporated, direct, by cashier's check. I did not send it to Newman to deliver to them. Subsequently, they sent the check back and asked me to make it to I. A. Needleman (740), so Needleman eventually got the money as he was the agent for the distillery. I did not make out my check for the whisky to Needleman, but made that to the Distiller. [233] I paid \$125 a week to Morrie Newman when he worked for me, as a salary. He was going to be the purchasing agent for us. It was presumed that I was going to get a carload of whisky every month. In the license itself, the distillery and Needleman both agreed that as soon as they could turn out whisky fast enough, and we could use it, we would receive it on an increasing amount month by month, so that eventually I would be getting a car about every two weeks, and if that was true I would need Mr. Newman to look after

(Testimony of Burt Cain.)

that whisky for me in the east, and also to buy other whisky from other distillers. Newman said that he knew a number of people in the east with distilleries, or who were officials of distilleries, and he hoped to be able to go back and get whisky. I heard the testimony of Goldstein and Williams in the transactions here.

(At this point a paper, identified by the witness and headed "Those entitled to merchandise exchange," was marked U. S. Exhibit 33 and admitted in evidence.) (742)

Acting on the assumption that I could get a carload of whisky every two weeks, I thought I could use Mr. Newman for the purpose of having him go down east to Chicago, New York, and other places, to buy whisky, and I thought it would be worth \$125 a week to employ Mr. Morrie Newman for that purpose. That was all Mr. Newman would have to do. He had nothing whatsoever to do with any local sales. From the first part of last year up to July, 1944, I was in San Francisco possibly twice. The first time I was here I think I stopped at the Sir Francis Drake Hotel. The second time I was here I could not get a room so I went to Nathan Newman's room at the Palace, sometime during the month of May, but I am not sure of that. My purpose in making the trip to the Palace Hotel was not to make out the [234] invoices from the sales slips, referring to Exhibit 3-B. These invoices were not made out for the most part at that time at the Palace. I did not see Jack Cardinelli at the Palace

(Testimony of Burt Cain.)

when Malaby and I were in the room there. I do not recall any occasion when Malaby, Nate Newman and I were in a room at the Palace Hotel, and Newman was at a typewriter making out invoices similar to those shown on Government's Exhibit 4 for Identification. Those invoices were all made out in my office in Los Angeles (745). They were executed in Los Angeles after I had received the signed orders. As I explained earlier, my purpose in using the documents such as Exhibit 3-B, was that I allowed him, Mr. Malaby, to use those blanks on which to fill out an order. At first Malaby was taking orders, so he told me, on some sort of a book that he had. Then I told him, by letter, to discontinue the use of those particular blanks, that they were not adapted for this business, and I changed the order form, and ordered all orders written up on that form—such as shown in Exhibit 4. It is not a fact that forms such as Government's Exhibit 3-B and similar orders were taken with a statement, "No cash down" on them, and the overage deposited at Files' office with my knowledge, and that then this, referring to Government's Exhibit 4 in evidence, executed as a cover-up for that transaction afterward (747).

Cross Examination

By Mr. McGuire:

The name of Oscar Lowenthal does not appear on the books of my company as a representative or salesman of the company.

(Testimony of Burt Cain.)

Cross Examination

By Mr. Licking:

There are no other conscious omissions on my books besides that of Lowenthal's except the name of Malaby. Nathan Newman appears as sales manager for the company; Morrie Newman was the purchasing agent, and he is the man who went back east [235] to buy the whisky, at \$125 a week. He did not stay in the east; he came back to Los Angeles. He returned to Los Angeles, I think in April, or sometime in May, and made his headquarters at the International Import Company. He looked after local purchases, small supplies and stuff we needed for the business, and sent out letters and circulars to various distillers. He called them up by long distance, in an effort to buy whisky at the ceiling. He interviewed various distillers around Los Angeles and did some business. I sold some McHenry Reserve in Los Angeles. I think about four or five hundred cases. We had salesmen there, one was named Erskine, another named Brown. Nathan Newman was sales manager. I never saw him take an order. I was only in San Francisco once with Nathan Newman. I was also up here along about January or February, but prior to the time when I saw these gentlemen, Newman and Malaby. It was not in connection with the liquor business. I first met Morrie Newman and then a couple of days later I met Nathan Newman. They did not tell me that they had participated in any orders in San Francisco for whisky

(Testimony of Burt Cain.)

for which they had collected over \$12,000 in overage. The first time I knew of it was sometime when I was east, in June. Benson wrote me two letters in New York, and sent them directly to me. I talked to Mr. Mathes about Mr. Files' telephone call to me. Files phoned me when I was in New York, and then after that. That was the first that I had ever heard of Files.

BURKE MATHES,

called as a witness on behalf of defendant Cain, being duly sworn, testified:

Direct Examination

By Mr. Ames:

My name is Burke Mathes, and I practice law in California, and have an office in Los Angeles, and have lived in Los Angeles sixteen years. I know Burt Cain and I am his personal attorney, [236] and have been for three years. He consulted with me concerning the obtaining of a wholesaler's license, and I assisted him therein by preparing the necessary paper and in drawing up the various forms, etc. I added to the forms the feature that no order would be binding on the International Import Company unless countersigned by Mr. Cain. I was not present at any conversations at which Malaby was also present, that had to do with the question of the black market. I have met Malaby. I have spoken to him in the hall here twice during the last few days, just to pass the time of day.

(Testimony of Burke Mathes.)

Malaby met Cain and me in my office on the afternoon of January 13. No one else was present. This was in 1945. Cain had told me that Malaby wanted a meeting, and I suggested that if he met him at all he should meet him in my office. Malaby came in and stated at that particular time that he was dealing in the disposal of surplus war products, and that he was out of the liquor business. He stated he had paid Mr. Ehrlich his fee and proposed to plead not guilty in this case, and then he brought up the subject of the Benson letter that has been introduced in evidence here, U. S. Exhibit 4-B. I did not see the letter at that time, but Malaby stated that in regard to the trial of his case that if Mr. Benson appeared against him that he had a letter in his possession that would offset any statement that Benson might make (753). He said that he was in the International Import office one morning prior to Mr. Cain's coming there, and he knew the letter was coming because it contained the order referred to in the letter; that he was the first there and picked the letter up. He did not state that Cain had never seen it. He just said he took the letter. I wrote U. S. Exhibit 31. During Mr. Cain's absence his office communicated with me and said that there was a letter out there in regard to one of the transactions, and that they were [237] going to mail it down to me, and asked me to acknowledge it. I wrote Mr. Benson this letter you just handed me, after receiving the other one. I wrote the letter because of Mr. Cain's absence I had the courtesy

(Testimony of Burke Mathes.)

of acknowledging that letter. During the meeting in which Cain, Malaby and I were present, I do not believe anything was said about black market collections. The only thing that I believe that was said was that Mr. Malaby said that Cain didn't have anything to worry about by reason of the coming trial. He did not elaborate on that statement.

Cross Examination

By Mr. Licking:

Mr. Malaby merely said, with respect to Exhibit 4-B, that he had gotten the letter from the International Import Company; that he was in there before Mr. Cain came down that morning and took the letter. He did not say whether the letter had been opened or not and made no statement about whether Cain had ever seen it. He did not show me the letter at that time. I believe he stated that the letter was in the hands of Mr. Ehrlich. I have never seen the letter myself before I came to court. In my letter to Mr. Benson I referred to a letter of a later date. As I recall it was a letter in regard to the fact that one of Benson's friends had had some whisky seized by the State government. That is the best of my recollection. I have known Mr. Benson about four or five years I believe. He officed in the same building that I did, and I had a casual acquaintance with him. I believe Mr. Benson wrote me one more letter besides the one that I wrote him, concerning the Spenger matter (755). In that letter there was something to the effect that Mr. Spenger wanted his money back that he had

(Testimony of Burke Mathes.)

deposited with Files. In fact, I had forgotten that letter until Mr. Benson showed it to me out in the hall yesterday, and I asked him then what was in the letter. I had [238] forgotten the incident entirely. The letter that I got from Mr. Benson came in about the time Mr. Cain returned from New York. I am sure I have never seen Exhibit 4-B; but after I had written my letter to him, I believe I had another letter from Benson.

(Witness excused.) (757)

Mr. Ames: If your Honor please, the defendant Cain rests. (758)

OSCAR R. LOWENTHAL,

one of the defendants, called in his own behalf, being duly sworn, testified as follows:

Direct Examination

By Mr. McGuire:

My name is Oscar Lowenthal and I live on Grove Street in San Francisco, and I am an electrical and an art designer. At the time I met Malaby I was working as an electrician, and contacted him through an advertisement in the newspaper. He came to see me about the middle of January, 1944 (763). I had never seen or heard of him before. Malaby asked me if I had any knowledge of whisky sales and I told him I had, because I had sold whisky in Vancouver, B. C. He wanted me to go to work for him and asked how soon I could start. I

(Testimony of Oscar R. Lowenthal.)

told him I would not be able to start until sometime in March. He told me he was going to have a warehouse in San Francisco and I would be doing business in San Francisco under him as the general manager. He told me he had a thousand cases of Ten High quarts on hand, and he had McHenry Reserve, Benjamin Franklin whisky, and one other brand, Mid-Valley, and Rock Creek (764). He gave me prices from \$48 to \$51. The McHenry was \$51. He said I would give 5 percent of my sales as a commission. He was to get me some cards, some stationery, letterheads and envelopes, and an office location, and I was to go out and canvas to get customers and turn the customers over to him by giving his card to the customers, and he would call on them. He was to close every deal, and I was not to close any or to accept any money. Nothing was ever mentioned about the OPA price. When I got ready to go to work he changed the price. This was about the 22nd or so of March. Between the time I met him in January and the 22nd of March [240] I met him several times. He came to my house one time with Mr. Newman and introduced Newman to me as the sales manager. McKinnon was there then. That was in February, I think. Newman told me that they were going to have a distribution here and he didn't do much talking. Malaby did all of the talking. Newman was introduced as the Sales Manager for the International Importing Company. I wrote a letter to the State Board of Equalization. I was to get a letter from the Inter-

(Testimony of Oscar R. Lowenthal.)

national Import Company showing that I was a representative of that company. I talked with McKinnon and Malaby in my apartment. Malaby told me that if I knew anybody else who could be a salesman, to let him know; so I brought McKinnon in, and he got the same instruction from Malaby that I got (767). We got one price from Malaby and in one instance I had quoted the \$51 price to a customer. Before I actually went to work for the firm I investigated it through my brother in Los Angeles. I wrote the State Board of Equalization, as Mr. Newman had mentioned that it would be a good idea if I got a distributor's license, and I wrote to the Board of Equalization and asked them what I could do to get a license. Sacramento referred me back to the Equalization Board in San Francisco, and they told me to get a letter from the International Import Company to go to work. I tried to get the letter several times from Mr. Malaby, and made a special trip to Los Angeles. I phoned several times to the International Import Company and could not get hold of Mr. Newman or Mr. Cain. I never met Cain there. I saw Miss Anderson in the office, and she gave me a few sheets of paper and I wrote Newman and Malaby and told them I was there and wanted some information. I took the letterheads back to San Francisco, and I wrote out the kind of a letter that I wanted, on the stationery of the International Import Company, [241] and this is the letter that I wrote.

(Testimony of Oscar R. Lowenthal.)

(The document was marked Defendants' Exhibit F for Identification.)

(Witness continuing:)

After I had written out the letter I talked with Malaby about it and asked him to get it signed; and I told him I would not go to work until I did get it signed. He kept stalling me, that he had to have Mr. Newman sign it, and I never did get the letter signed.

(The letter was marked Defendants' Exhibit F in evidence.)

(Witness continuing:)

The first transaction I was interested in was with Mr. McKinnon in connection with 25 cases at the Red Raven Bar. That was the Becker deal. I simply went up to find out how much money was to be paid down and tell Mr. McKinnon where to take it because he had not been to 309 Kearny Street and Malaby had introduced me to Mr. Shaeffer. I was introduced to Shaeffer in connection with the Red Raven deal, and not with the Thomason deal (773). I first learned of Shaeffer or Files a few days before the Red Raven Bar deal. When I first met Malaby in January, nothing whatever was said about Files or Shaeffer. I did not hear about them until sometime in March. Malaby took me down and introduced me to Shaeffer, but never to Files. I never saw Files. He told me if I had money to put up, and he was not around, to take it to Mr. Shaeffer's office; that is, to take the customer there,

(Testimony of Oscar R. Lowenthal.)

and he would do the rest. Malaby had told me to get as close to half the money down as possible; but that he would do the closing of the deal. Becker had given McKinnon \$300, and I told him that he knew where to take it. He said that he did not; that he had not been down there yet. I told [242] him to take it down to Mr. Shaeffer's office on Kearny Street. That was the only connection I had with that deal. I did not have anything to do with the Thomason deal at all, and never met Thomason in El Cerrito until I had been out one Saturday and walked in there to have a drink. He asked me where Malaby was, he had a customer for some liquor, and I asked him why he did not give me the order so I could get a commission on it. Then the bartender introduced me to Thomason. That was the first time I had seen him. I told Thomason I was connected with the International Import Company, and handed him Mr. Malaby's card, because that was my instructions. He asked me what the price was and I told him he would have to get the price off of Malaby because there were some new prices being made. I made an appointment, and Thomason met Malaby at the O'Brien Bar the next day. Thomason did not have his money with him that date so he said he would see us the next day. And the next day Malaby showed up. Malaby took Thomason into Files' office and sat down as if he owned it. That was the first time I had had any transaction in Mr. Files' office, and Malaby told me that that was his office (776). I first walked into

(Testimony of Oscar R. Lowenthal.)

the office and Thomason sat on one side of Mr. Files' desk and Malaby on the other. The money was taken out. I was outside prancing around the gate. I never heard what the price was between Malaby and Thomason, but Malaby called me and asked me how much I told this man he was to pay, and I told him he was to pay \$57.50. Malaby closed the transaction. [243] Shaeffer was not there. I saw Malaby make out the receipt, and then Files came in, but I never saw the receipt myself. I was not one bit interested in the Elliot Smith transaction. I met a man named Navinger and he told me about Smith wanting whisky, and I told him I wanted to make a commission, so I told him I would go over and talk with Smith. Later I went over and saw Smith and his partner, but Smith did no business with me. Navinger told me he quoted him a price of \$60 and I should keep my nose out of it because he could get more. I had nothing more to do with the closing of the transaction. Malaby closed the transaction and collected the money. I never did see, until I came here to the court room, Government's Exhibit No. 18-A, a card with writing on it. It is not my handwriting and I did not give that card to Smith or to anyone else. The first time I heard of the Joe Di Silva deal was when Malaby got an order for ten cases of whisky and asked me if I would go over with it and deliver it, and collect \$65 a case for two cases of Rock Creek; and I went over with that whisky with the delivery man, and collected cash from Mrs. Di Silva amounting to

(Testimony of Oscar R. Lowenthal.)

\$130 for two cases of Rock Creek whisky. Malaby gave me \$10 on that transaction and that was my only connection with it. I did not take any order at all for any McHenry whisky. Later I took Malaby into one of Di Silva's places, and he signed Di Silva up; but I would not bother with it. I received an open bottle of whisky from Malaby as a sample. I took the labels off the bottles of whisky that Malaby gave me, and made up a little booklet to show to my customers. In the back of that book is a typewritten list labeled, "Cost of McHenry Bourbon Whiskey." Malaby had written out on a piece of paper how he had arrived at the price of \$57—the breakdown is what he called it, and I put it in the book and turned it over to [244] the customer at the same time to show them. That was the exact copy of the list that Malaby gave me. When Malaby gave me the list I copied it into this book. This list shows that the first cost of the whisky at Archibald, Penn., was \$44.56 a case, and the additional handling cost was \$12.94 (783), to cover the Los Angeles company's taxes, watchman's fees, bonded warehouse cost, State of California fee of \$1.92, hauling from warehouse to distributor's location, 50 cents a case—15 percent of the order, on an average, went to the distributor, which is an average of \$3.90. Railroad freight from Archibald to Los Angeles, \$1 a case. Hauling charges from Los Angeles to San Francisco, \$1 a case. Sales manager's 5 per cent, or an average of \$1.50 a case. Gas, pas-

(Testimony of Oscar R. Lowenthal.)

senger car, fares, and transportation, average \$1 a case. Total, \$12.94.

Mr. McGuire: We will offer this in evidence, if the Court please.

The Court: It may be admitted and marked.

(The book was marked Defendants' Exhibit G in evidence.) (784-785)

(Witness continuing:)

Prior to the time that I received that list from Malaby I had a conversation with him in my apartment and I told him I couldn't sell any whisky, that it was too high; and I never went out to sell any more; and I asked him again for my letter. He told me that was the price, and if I did not like it to go to hell. I told him I could not sell any more whisky at that price because he had raised the price on it two times. I told Malaby that I could not sell whisky at that price because I had to have something to show the customer why it was \$57.50, and he told me to tell the customer to go to hell. (786) At that time he gave me the list, and figured out to show why [245] I should get \$57.50. He never mentioned OPA or overages to me at any time. He promised and promised shipments of whisky. He said it was in a flood, and it was away too late. All of this time I was getting the devil from the people I had contacted for their whisky. I went up to the OPA to ascertain if McHenry whisky was on the market, but before that I went around to at least 50 bars in Oakland and Berkeley and San Francisco trying to buy a drink of McHenry, and I

(Testimony of Oscar R. Lowenthal.)

could not find a drink. Later I went up to the OPA and asked about it. I wanted to see if I could get some information as to the McHenry whisky. Malaby had told me it was coming and brought me another sample in a mason jar. He told me it was from another bottle and to use it for samples. Instead of that I drank it. The OPA told me that they had never had McHenry whisky listed, and he looked at some book there and he said that they did not have it listed and he couldn't give me any price on it. I looked in half a dozen beverage magazines and I could not find McHenry whisky. In the course of my travels I secured Defendants' Exhibit A. I got that when I left the OPA office, when I met a man who was getting some prices, and he asked me why I did not get an OPA price list from the supply department upstairs. I went back up to the little window and asked for an OPA price list on whisky. The lady told me they had none. This was about the time after I had made the Thomason deal. The man told me I could get a list, if I would go to a certain place. I went down to 539 Kearny Street and asked if I could see a list and get the information. There were other brands on the list but I never saw any McHenry on there. I told Malaby about it and he told me he was going down to Los Angeles and coming up with truckloads of it, and would bring me a case of samples; and he told me as far as the price is concerned the OPA had nothing to do with his McHenry whisky. [246] I believed him. I was interested in the McNeil

(Testimony of Oscar R. Lowenthal.)

transaction (790). Newkirk was acquainted with Mrs. McNeil and I told him if he could sell some whisky I would give him 5 percent. I told Malaby who was leaving for Los Angeles that I did not want to lose my commission on the deal. He said he had to go to Los Angeles and was coming back with two truckloads of McHenry. I asked him for two signed contracts. He gave me three or four, and told me what the price was. He signed them in blank. So when Newkirk called me and told me that Mrs. McNeil wanted to see me I went over there, and he introduced me to her, and she told me that her arrangement with Newkirk was that she was to pay \$57.50 a case for 200 cases, and wanted to know how much money she was to pay down. I told her to pay half down, if she could, because that was the way Malaby had instructed me. She gave me \$4380 and some odd, at first. I gave her a receipt and the contract that Malaby had given me and put in \$11,400. I took the money, and because Malaby was not here, I put it in my vault on Monday morning. Four or five days later, Malaby came back, and by that time I had found out that Mr. Malaby had to refund the money on the Red Raven Bar; and I figured that if they had to refund the money to the Red Raven Bar I would hold the money until I found out why (793). I refused to give the money to him when he came because I figured that he was not delivering the whisky. I went over to Margaret McNeil's and told

(Testimony of Oscar R. Lowenthal.)

her she had better get her money back, that I had it in my vault. She told me to bring it over there, but I did not do that. That night, about 11 or 12 o'clock, Mrs. McNeil told me that Newman and Malaby had been over there, and she had instructed me to give the money to Mr. Newman and Mr. Malaby. On that morning I telephoned her and she told me to give the money to Newman because she had found out the firm was all right and [247] she would rather have the firm have the money than some one she did not know. She told me to turn the money over to the International Import Company agents, Mr. Malaby and Mr. Newman (795). I turned the money over to Newman, in Malaby's presence. They paid me my commission, but Malaby told me I had made a mistake in my figures in the receipt I had given Mrs. McNeil for the money, and told me if I wanted my commission I had better go and get that money. I went back and showed her the mistake. It was written out on a piece of paper in Malaby's handwriting, and I copied it myself from his figures on some yellow sheets. I asked her to give me back my receipt, but she did not. I do not know what happened to the receipt. I never saw Malaby after that. Malaby figured out this deal. I noticed the price that he quoted. He put on the statement that he showed me, "Ceiling Price," so much money, and he told me that that is the way they were shipping the stuff out. We had quite an argument, and I told

(Testimony of Oscar R. Lowenthal.)

him that it was a hell of a note. That is the first time that I discovered that the whisky was being quoted at a different price than Malaby had given to me. I was through selling whisky before that, anyway, and I severed my connection. I had no more business dealings with him whatsoever. That was around the latter part of May. It was a few days after April 29, the date shown on Government's Exhibit 8-A, and I still had another deal in progress which I wanted to try to make. I called up Mrs. McNeil and asked her if everything was all right, and she said that it was and that she had just got 50 cases. I made out Defendant's Exhibit B for Identification in Mrs. McNeil's kitchen. She told me she had some rum and stuff that she wanted to sell, and asked me if I could sell it, and if I could that she would pay me a commission, and she gave me a list. She called out the figures for me to put down [248] and called off the articles, and I wrote them down on this piece of paper. This is the list. Mr. Bird, the OPA investigator, came to my house while I was in bed. I did not have any knowledge whatsoever of any alleged illegal object or conspiracy existing between Malaby and Newman or any other defendants in this case, and there was no fraudulent intent or motive on my part to engage in any illegal transaction as charged in the indictment; and I did not join in any agreement or conspiracy with Malaby or Newman or any other defendant about selling whisky over the OPA ceil-

(Testimony of Oscar R. Lowenthal.)

ing price. Nothing was ever said to me by Malaby or Newman or any other defendant in this case concerning the selling of whisky over the ceiling except in the McNeil case. At the time I was selling liquor I did not understand or believe that I was selling in excess of the price fixed, and I did not at any time conspire or agree with divers persons to commit offenses against the laws of the United States, particularly as to the sale of whisky in excess of the price fixed by the Office of Price Administration (803).

Cross Examination

By Mr. Licking:

The first time I knew anything about these transactions being over the ceiling price was when I talked to Malaby during the McNeil transaction. That was a few days before the execution of Government's Exhibit 8-A, which is dated April 29. It was really a few days after that date of April 29 (804). After I found out that the ceiling price was being violated, I still worked on a couple of deals that I had pending, so I would not lose on them. They did not go through, however; I quoted those deals long before that. The pieces of paper which you show me are a letter addressed by me to Nathan Newman at the Palace Hotel, and bears the stamp on the back, "Palace Hotel, Front Desk, May 25." It was addressed by [249] me and left at the Palace Hotel (805). It reads:

(Testimony of Oscar R. Lowenthal.)

“Palace Hotel Company, Front desk,
1944 May 25 P. M. 1:50

“1:50 P. M. The Palace Hotel, San Francisco
May 25, 1944.

“Hello Mr. Newman. I was here, tried to locate you in vain. I have gone after money and I don't mean maybe. ‘Can't rest,’ as Doctor advised, leaving you holding the sack, so if I don't get it you know where there. I am on my way to L. A. as it seems! No one will refund, as they should, without a lot of B. S.

“Don't forget to take care of that 300 cases Oakland deal. Mrs. Fernandes 7126 East Fourteenth Street. This means money I surely earned and I don't wish to lose all work for two months past. Tell Malaby Jimmie Gibson is pretty sore. Let's not lose that to for lack of merchandise.

“I'll see you as soon as I get back.

OSCAR.”

“P.S. Tell Malaby Hello. Oh, leave me three samples.”

(The document was marked U. S. Exhibit
34.) (806-807)

(Witness continuing:)

In spite of that letter I still contend that I had severed my connections with these transactions sometime in April.

(Testimony of Oscar R. Lowenthal.)

Redirect Examination

By Mr. McGuire:

After I quit my job I never had enough money to square up Mr. Newman on the McNeil money, so I went out to the Shows in which I had an interest, to collect the money, but did not get as much as I expected, and that was why I wrote the letter to Mr. Newman.

Cross Examination

By Mr. Licking:

I wanted three samples for the customers referred to in [250] there, to whom I had introduced Mr. Malaby and Mr. Newman. They wanted samples, and I never got them, so I asked Newman to get them and take them out there, because they were still interested in closing their deal (813).

Cross Examination

By Mr. Gillen:

My first conversation with Malaby regarding employment, he told me I was to make possible sales connections and then call him in as the general manager or as sales manager in the area to close the transactions, and that I was not to collect any money; and that is why I wrote the form of letter which I thought I should have by way of credentials. It is dated March 20, 1944, and is Defendants' Exhibit F. It was my understanding that Mr. Malaby was to collect all of the money and he was always on the spot to collect it (815). He introduced me to Shaeffer one time only, and I only

(Testimony of Oscar R. Lowenthal.)

made one deal in Shaeffer's office. Malaby charged me the commission. He took the first commission out of my commission. The only deal on which I went into the office on Kearny Street was the Thomason deal, and neither Shaffer nor Files was present. Malaby had told me that if I got any customers and he was not there, to take them into 309 Kearny Street, to deposit the money there. I had very few words with Shaeffer. He did not seem interested in me.

Further Cross Examination

By Mr. Licking:

I never did meet Mr. Cain until in this court room. I did not know he was in the Palace Hotel when I wrote the letter to Newman. When I was in Los Angeles I visited the office of the International Import Company to see if I could locate Malaby. I went in the office and asked for Cain or Newman or Malaby, and none of them were there. I never had any connection with the International Importing Company, as I see it now; but when I went in their office I figured I was listed with them, but I [251] never did meet Mr. Cain. My purpose in going to the office of the International Import Company was to get commissions (822). I went to Los Angeles after the whisky had been delivered, and after I had written this letter to Mr. Newman at the Palace Hotel on May 25. I asked the girl for Mr. Cain and for Mr. Malaby. I met Morrie Newman at one time, at the Palace Hotel in San Francisco (823). Malaby introduced me to

(Testimony of Oscar R. Lowenthal.)

Nathan Newman, about six weeks before I met Morrie Newman. Most of my discussions were with Malaby, but I did discuss the McNeil deal with Newman (825).

(Witness excused.)

CHARLES MALABY,

recalled for the Government in rebuttal; previously sworn.

Direct Examination

Mr. Licking: * * * it is stipulated that I may withdraw and substitute photostatic copies of two entries from the Palace Hotel showing that Nathan Newman and Burt Cain were registered there in Room 60224 on May 25. I offer these in evidence for that purpose.

Mr. Cannon: * * * I do object, to introduction in evidence at this time of any matters at all with respect to Mr. Newman in view of the fact it is not proper (826) rebuttal of any kind and in view of the further fact that Mr. Newman offered no matters in defense at all, but closed with the Government's conclusion.

Mr. Licking: If it is a conspiracy I doubt very much if any one counsel ever resting at any time could prevent the introduction of evidence.

Mr. Cannon: I think there should be no doubt about it. * * * (827)

Mr. Ames: If your Honor please, I have no ob-

(Testimony of Charles Malaby.)

jection to the statements contained in the particular registration card. [252] We are not denying the man's signature, not denying that he was there at that time. I am objecting, however, upon the ground it is not proper rebuttal of the direct testimony of Mr. Cain. He admitted he was there at or about that time.

The Court: That is my recollection. (828)

* * * *

Mr. Cannon: I take an exception. (828)

(The registration card was marked U. S. Exhibit 35 in evidence.) (829)

(Witness continuing:)

I recognize Government's Exhibit 32. Cain, Nate Newman, and I went to Mr. Cannon's office in Los Angeles because Cain wanted to ask Mr. Cannon's advice about dictating a letter, and Mr. Cannon told him he was not interested in any way, shape or form, but if he wanted to dictate a letter he would be glad to have it typed there. That is the letter that was dictated by Mr. Cain. I was furnished with a copy of it and Mr. Newman was furnished with a copy, and so was Cain. I do not know whether Mr. Cannon was in the office at the time the letters were delivered to us or not.

Cross Examination

By Mr. Ames:

I know that the letter was later revoked by Mr. Cain. Mr. Ehrlich was supposed to have it (830). I do not know that the original was never sent. It

(Testimony of Charles Malaby.)

is not true that at that time I was threatening Mr. Cain to lie about him in this case if he did not pay my attorney, Mr. Ehrlich. Mr. Cain and I have always been the best of friends, up to the moment that I pleaded guilty here.

Redirect Examination

By Mr. Licking:

Mr. Cain paid the premiums for my bail and the bail of Mr. Newman.

Mr. Cannon: If your Honor please, at this time I move [253] to strike out this Exhibit 35, and I make the motion on behalf of Mr. Newman on the ground it is incompetent, irrelevant and immaterial, and I also move at the same time to strike out all of the rebuttal testimony, so-called, elicited from Mr. Malaby. * * * (833)

Mr. Licking: The only matter that is offered against your client, Mr. Newman, is the fact your client was here at the Palace. The other was introduced merely upon the credibility of the witness, Cain.

Mr. Cannon: All right.

* * * *

Mr. Cannon: * * * I make the motion at this time, if the court please, to (834) strike from the record as far as Mr. Newman is concerned all those conversations and documents, all the testimony concerning which a similar motion was made at the conclusion of the prosecution's case in chief, and which your Honor denied. I make those motions without specifically stating them again, but refer-

(Testimony of Charles Malaby.)

ring to the ones made by Mr. Sheffy and the ones which I made at that time to strike certain evidence from the record. I make it jointly and severally for the defendants.

The Court: You want a record on it?

Mr. Cannon: Yes.

The Court: The motions will be denied.

Mr. Cannon: Exception taken jointly and severally.

At this time, if the Court please, I make at the conclusion of the entire case, I move the Court to dismiss the indictment as to each defendant and to acquit each defendant on the grounds heretofore stated, first, the indictment does not state any offense punishable by any laws of the United States or under the Constitution of the United States. I make the motion further [254] on the ground the indictment is so indefinite and so uncertain as to be insufficient to place the defendants or any of them on notice of what they are required to meet. And I also make the motion on the ground that at the conclusion of the entire case there isn't any sufficient evidence upon which your Honor could find these defendants or any of them guilty of the offenses charged. (835)

The Court: For the purpose of the record, I take it the Government had better answer that.

Mr. Licking: If your Honor please, I will answer it just this way: There is evidence before the Court which definitely implicates all of these defendants. Without the evidence of anyone else, the

(Testimony of Charles Malaby.)

evidence of the defendant Malaby definitely implicates every defendant in the case in complicity in this and in definite knowledge of it. There is positive evidence before the Court of at least three instances involving every defendant mentioned in the case. I will submit it. (836)

BURT CAIN

recalled on his own behalf, further testified:

Direct Examination

By Mr. Ames:

It is not true that I put up the bail money for Mr. Malaby and Mr. Newman in this case.

Cross Examination

By Mr. Licking:

Mr. Newman put up the bail money, but I have no idea where he got it. He did not get the money from me; and I do not know where he did get it (837). [255]

Mr. Gillen: May it please your Honor, on behalf of the defendant Shaeffer I desire to adopt and take advantage on the defendant Shaeffer's behalf of the technical motions that were presented to your Honor, that is, to adopt from the presentation at the close of the prosecution's case on the technical grounds advanced by both Mr. Sheffy and Mr. Cannon, and I believe Judge Ames; and in addition to that I at this time respectfully move your Honor

for the dismissal of the defendant Shaeffer upon the ground of a total lack of evidence in the prosecution's case, in the Government's case, to establish or connect Shaeffer with any conspiracy, if one existed. (838) * * *

The Court: —it is clearly the duty of the Court to deny your motion. (838)

Mr. Fillen: Very well, your Honor.

Mr. Cannon: I take exception on behalf of each defendant jointly and severally to the denial of the motion.

The Court: Let the record so show.

Mr. Cannon: At this time I make a motion to require the prosecution to elect on which of the overt acts that are specifically alleged in the indictment it will rely for a conviction in this case.

Mr. Licking: All of them. (838-839) * * *

Mr. Licking: I said all of them, counsel. (839) * * *

The Court: All of the overt acts alleged in the indictment.

Mr. Cannon: And that he feels he has introduced sufficient evidence on each and all of those overt acts. That is what he contends.

The Court: The other answer to that is that if it is sufficient under any one of these acts, it is sufficient for all purposes, if all of the defendants—

Mr. Cannon: Were in the conspiracy at the time the overt [256] act was proved to have been committed.

The Court: That is my state of mind.

Mr. Cannon: On this motion to require him to elect, I think you are right so far. When your Honor goes to render judgment, I may have a different view.

I take exception to your Honor's refusal to require the prosecution to elect.

During the course of this trial at one time counsel suggested that he was abandoning all of the overt acts except the last one alleged, and furthermore, there is the objection I have heretofore made from time to time as to the propriety of the introduction in evidence of certain documentary evidence as against all of the defendants and as to the propriety of the admission in evidence of certain conversations that have occurred between certain of the defendants out of the presence of other of the defendants after one of the alleged overt acts had been completed. That is the basis of the motion.

Mr. Licking: I submit it.

Mr. Cannon: I assume your Honor will not require him to elect on which particular one at this time. I take exception.

Mr. Licking: I have made the election. I stated to the Court that I am relying on all of the overt acts.

Mr. Ames: Your Honor, I have addressed you as to the guilt or innocence of my client——

The Court: Are you addressing yourself to the Court on the motion?

Mr. Ames: Did I understand that you deny the motion as to the defendant Cain as well?

The Court: As to all defendants I did not know that all the attorneys submitted the motion.

Mr. Ames: I submit it, your Honor.

The Court: Very well. [257]

Mr. McDonald: If your Honor please, I thought you were looking at me when you made that suggestion. Just for the purpose of the record, I want to join in the motions heretofore made by other counsel.

The Court: Very well.

Mr. McDonald: I except to your Honor's rulings. (839-840-841) * * * [258]

Thereupon on February 2, 1945 the Court found the defendants, and each of them, guilty of the charges laid in the indictment. Thereupon the defendant Nathan Newman filed the following Motion for Arrest of Judgment:

No. 29086-R

MOTION FOR ARREST OF JUDGMENT

Comes now the defendant Nathan Newman and moves the court to refrain from entering a judgment against him based upon the court's finding of guilt in this case upon the following grounds:

1. That the said indictment does not state facts sufficient to constitute a punishable offense or any

offense or crime against the laws or any law or against the Constitution of the United States, and particularly, said indictment does not state facts sufficient to constitute a violation of Title 18, United States Code, Section 88, a conspiracy to violate title 50 to the United States Code, Appendix Section 904a-925.

Dated: February 2nd, 1945.

DAVID H. CANNON

Attorney for Defendant Na-
than Newman [259]

I, David H. Cannon, do hereby certify that the above and foregoing motion is made in good faith and not for the purpose of delay, and in my opinion is well taken in law.

DAVID H. CANNON

Attorney for Defendant Na-
than Newman

POINTS AND AUTHORITIES IN SUPPORT OF THE FOREGOING MOTION

Reference is respectfully made to written Memorandum on Behalf of Nathan Newman, Defendant, heretofore and on January 23, 1945, served and filed with the above entitled court and particularly upon the following authorities therein cited:

United States v. Eisenminger, 16 Fed. (2d) 816,
817.

United States v. Kissel, et al., CCA N. Y., 173
Fed. 823.

United States v. Cruikshank, 292 U. S. 542, 558, 23 L. Ed. 588.

Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 422.

United States v. Carll, 101 U. S. 661; 26 L. Ed. 1135. [260]

In which Motion all of the defendants joined. Said Motions were then denied by the Trial Court and exceptions duly taken by each of the defendants.

The Court thereupon sentenced the defendants as follows:

Nathan Newman and Burt Cain, each, to imprisonment for a year and a day, and each to pay a fine in the sum of Ten Thousand Dollars (\$10,000.00); the defendants W. O. Files, R. H. Schaeffer and Oscar R. Lowenthal, each, to imprisonment for a period of nine months in the County jail, and each to pay a fine in the sum of Five Thousand Dollars (\$5,000.00). [261]

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS RE RECORD ON
APPEAL

Dated February 10, 1945

This case came on regularly this day for hearing the Court's instructions regarding the preparation of the record on appeal. William E. Licking, Esq., Assistant United States Attorney, was present on

behalf of the United States. Fred. McDonald, Esq., and S. E. Sheffey, Esq., were present as the attorneys for the defendants. On motion of Mr. McDonald, it is Ordered that the defendants have fifty (50) days within which to prepare and lodge their proposed bill of exceptions, that the United States is to have ten (10) days thereafter to file its proposed amendments. Further ordered that this case be continued until April 11, 1945, for settling the bill of exceptions. [262]

[Title of Circuit Court and Cause.]

ORDER EXTENDING TIME

Upon reading and filing the Affidavit of David H. Cannon, and good cause appearing,

It Is Ordered that the Appellants herein may have to and including April 15, 1945 within which to prepare, serve and lodge the proposed Bill of Exceptions herein, and within which to prepare, serve and file their Assignments of Error; that the Appellee, the United States of America, have ten days thereafter within which to file its proposed amendments to the Bill of Exceptions and that the time for the settling said Bill of Exceptions be and the same is hereby extended to May 1, 1945.

Dated: April 2, 1945.

.....
United States Circuit Judge

[Title of District Court and Cause.]

APPROVAL OF BILL OF EXCEPTIONS

This Bill of Exceptions having been duly presented to the Court, and having been amended to correspond to the facts, is now signed and made a part of the record in this case, and said Bill of Exceptions contains all of the evidence submitted to the trial court, except certain exhibits offered and received in evidence, but which said last mentioned exhibits are, under Stipulation of counsel, epitomized in said Bill of Exceptions, and the originals of which are transmitted to the Appellate Court; and said foregoing Bill of Exceptions is settled and allowed, all within the time fixed by proper Orders of Court.

Dated: April 28th, 1945.

MICHAEL J. ROCHE

Judge [264]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated the foregoing Bill of Exceptions is correct, and that the same may be settled and allowed by the Court.

FRANK J. HENNESSY

United States Attorney

WILLIAM E. LICKING

Assistant United States At-
torney

Attorneys for plaintiff and
appellee.

DAVID H. CANNON,
FRED McDONALD,
S. E. SHEFFEY,
By FRED McDONALD,
Attorneys for defendants and
appellants. [265]

District Court of the United States
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 265 pages, numbered from 1 to 265, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of the United States of America vs. Nathan Newman, W. O. Files, R. H. Shaffer and Burt Cain No. 29086 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$17.15 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 10th day of July,
A. D. 1945.

[Seal]

C. W. CALBREATH

Clerk

By M. E. VAN BUREN

Deputy Clerk [266]

[Endorsed]: Filed May 31, 1945.

[Endorsed]: No. 10990. United States Circuit Court of Appeals for the Ninth Circuit. Nathan Newman, W. O. Files, R. H. Shaffer, and Burt Cain, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 18, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10990

BURT CAIN, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY ON
APPEAL AND DESIGNATION OF REC-
ORD NECESSARY FOR THE CONSID-
ERATION THEREOF.

To the Clerk of the Above Entitled Court:

In accordance with Sub-division 5 of Rule 19 of the above entitled court, you are hereby advised that the appellants herein adopt as their points on appeal, the Assignments of Error appearing in the transcript of the record, and said appellants hereby designate for printing the entire transcript of the record as certified to you.

Dated: May 31, 1945.

DAVID H. CANNON

Attorney for Appellants, Burt Cain, Nathan New-
man and W. O. Files.

[Endorsed]: Filed July 3, 1945. Paul P. O'Brien,
Clerk.